MediaCorp News Pte Ltd & Ors v MediaBanc (Johor Bharu) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5(D2)–22–763 OF 2007
NALLINI PATHMANATHAN J
26 MARCH 2010

Copyright — Existence of — Broadcast of television and radio programmes — Whether eligible for copyright protection under the Copyright Act 1987 — Whether breach of provisions of the Communications and Multimedia Act 1998 vitiate copyright protection — Whether copyright protection available for foreign broadcast — Copyright Act 1987 ss 10, 42(1) & 59A — Copyright (Application to Other Countries) Regulations 1990

Copyright — Infringement — Broadcast of television and radio programmes — Copying, recording and reproduction of substantial part of broadcast — Whether infringing plaintiffs' broadcast copyright and film copyright

Copyright — Infringement — Defence of fair dealing — Whether defence available — Criteria to satisfy for invoking defence of fair dealing — Whether material copied for non-profit purposes — Copyright Act 1987 s 13

Copyright — Ownership — Ownership of copyright — Broadcast of television and radio programmes — Whether ownership of copyright proven — Whether true copies of works produced in court — Whether producer author of broadcast — Copyright Act 1987 s 42(1)

Words and Phrases — Meaning of 'author' — Copyright Act 1987

The plaintiffs were broadcasting and media group of companies in Singapore. They delivered information and news to the public through television, radio, newspapers, magazines, movies and out-of-home media. The defendants were a group of companies incorporated in Malaysia providing integrated print/radio/television monitoring agency. The defendants selected television news programmes and commercials, radio news programmes and commercials, and newspaper and magazine advertising from which they collected, compiled, catalogued and archived data and information in a database. The defendants, from the compiled databank, for a fee, provided

information to their clients who routinely required information and particulars of the media exposure they received or media exposure of other entities or persons. When providing this data to their clients, the defendants routinely supported and backed up the information and data provided with clips of news segments and commercials from their database. The provision of these clippings of news segments or commercials from the radio, television and other media which were produced, authored and delivered by the plaintiffs gave rise to the present dispute. The plaintiffs claimed that the defendants' continuous recording, compiling and archiving of their broadcasts and media programmes amounted to a breach of copyright. The defendants denied breach of copyright and maintained that even if the plaintiffs were able to establish a breach of copyright their relatively restricted use of such data as a monitoring agency amounted to 'fair use' falling within the purview of s 13 of the Copyright Act 1987 ('the Act'). The primary issues arising for consideration were as follows: (i) had the plaintiffs established ownership of copyright in the television and radio news programmes produced and broadcasted by them; (ii) had the defendants' infringed the plaintiffs' copyright in the said works; and (iii) was the defence of fair use/fair dealing available to the defendants. Notwithstanding that the plaintiffs sought protection for all television news programmes and radio programmes, for the purposes of the trial, they produced in evidence four full television news programmes of 30 minutes each, which were annexed to an affidavit in compliance with s 42 of the Act. The plaintiffs also produced through PW5, ie vide the trap purchases, infringing copies. The defendants contended that the plaintiffs had breached the Communications and Multimedia Act 1998 ('CMA') and therefore the subsistence of copyright was vitiated.

Held, allowing the plaintiffs' application with costs:

(1) The 'author' of a broadcast of the television news programmes would be the person or corporate entity transmitting the programme if he or it has responsibility for selecting the contents of those television news programmes, or anyone providing the programme who works together with the person transmitting it. Thus, the 'author' of a broadcast is the producer of the broadcast. The author of the television news programmes was therefore the producer of those news programmes. By virtue of establishing that the first plaintiff was the producer of the television news programmes and that it subsequently assigned all those rights to the fourth plaintiff, the plaintiffs had established authorship in the news programmes entitling the broadcasts of the television news programmes to be eligible for copyright protection under the Act (see paras 111 & 117).

(2) There were no true copies of the broadcast of the radio programmes or a reduction into fixed form of the sound recordings of such radio programmes. There was no object or copy which the court could refer

to as the 'works' in respect of which broadcast and sound copyright protection was sought. In order to establish copyright in the radio programmes it was incumbent upon the plaintiffs to produce a true copy of, at least, some radio programmes, as they did for the television news programmes (see paras 127–128).

(3) The plaintiffs' broadcasts of their television news programmes fell within the purview of s 10 and were eligible for copyright protection under the Act. Being Singaporean, they were eligible for copyright protection by virtue of the reciprocity and conferment of protection provision in s 59A and reg 4(1)(a) and (b) of the Copyright (Application to Other Countries) Regulations 1990 (see paras 133 & 169).

(4) Even if there was a contravention of the CMA, the plaintiffs were entirely without mens rea in 'committing' any such illegality. The non-compliance with the provisions of the CMA did not deprive the plaintiffs of broadcast copyright protection (see para 184).

(5) Since the plaintiffs enjoyed broadcast copyright protection under the Act, the defendants are not at liberty to record, reproduce a substantial part of the broadcast either in its original form or in any way recognisably derived from the original, unless they had the express permission or a license from the plaintiffs. The defendants' acts of copying the news programmes in totality for the purposes of compiling, storing, editing and selling or reproducing segments for sale infringed the plaintiffs' broadcast copyright and their film copyright in the pre-recorded segments of those broadcasts (see paras 188 & 193).

(6) The matters to be considered in determining whether a use or dealing is 'fair dealing' within the Act includes the following factors: (i) the purpose of the dealing and whether it falls within the specified exceptions in s 13(2)(a); (ii) the nature of the work; (iii) whether it can be said that a substantial part of the work has been copied or utilised when compared with the original work; (iv) on an objective assessment what is the impression created by the reproduced/copied dealing; (v) the effect of such dealing upon the potential market for, or value of the work; and (vi) what is the motive of the party in its dealing with the work (see para 215, 215(a)–(f)).

(7) The motive of the defendants in recording continuously the broadcasts of the plaintiffs' television news programmes was to compile an archive of information so as to provide data and analysis to its clients for a fee. The defendants' operations as a media monitoring agency did not fall

within the purview of the statutory exception. Neither did it fall within any of the other exceptions set out in s 13(2) of the Act (see paras 216(f) & 248).

[Bahasa Malaysia summary

Plaintif-plaintif adalah kumpulan syarikat penyiaran dan media di Singapura. Mereka menyampaikan maklumat dan berita kepada orang ramai melalui televisyen, radio, akhbar, majalah, wayang dan media di luar rumah. Defendan-defendan adalah kumpulan syarikat ditubuhkan di Malaysia yang menyediakan agensi pemonitoran penerbitan/radio/televisyen. Defendan-defendan memilih berita rancangan dan iklan televisyen, berita rancangan dan iklan radio, dan pengiklanan akhbar dan majalah yang telah dikumpul, disusun, dikatalogkan dan diarkibkan data dan maklumatnya dalam pangkalan data. Defendan-defendan, berdasarkan bank data yang dikumpul, untuk suatu bayaran, telah memberikan maklumat kepada pelanggan yang secara rutin memerlukan maklumat dan butir-butir pendedahan media yang diterima oleh mereka atau pendedahan media terhadap entiti atau orang lain. Semasa memberikan data ini kepada pelanggan mereka, defendan-defendan secara rutin telah disokong dan mendapat maklumat dan data sokongan yang telah diberikan dengan keratan segmen berita dan iklan daripada pangkalan data mereka. Peruntukan keratan segmen berita atau iklan daripada radio, televisyen dan media lain yang diterbitkan, dikarang dan dihantar oleh plaintif-plaintif telah menimbulkan pertikaian ini. Plaintif-plaintif mendakwa bahawa rakaman, pengumpulan dan pengarkiban berterusan defendan-defendan terhadap penyiaran dan rancangan media mereka membentuk pelanggaran hak cipta. Defendan-defendan menafikan pelanggaran hak cipta dan menegaskan bahawa meskipun plaintif-plaintif dapat membuktikan pelanggaran hak cipta penggunaan data mereka yang agak terbatas sebagai agensi pemonitoran membentuk 'penggunaan adil' yang terangkum dalam skop s 13 Akta Hak Cipta 1987 ('Akta tersebut'). Isu-isu utama yang timbul untuk dipertimbangkan adalah seperti berikut: (i) adakah plaintif-plaintif telah membuktikan hak milik terhadap hak cipta dalam rancangan berita televisyen dan radio yang diterbitkan dan disiarkan oleh mereka; (ii) adakah defendan-defendan telah melanggar hak cipta plaintif-plaintif dalam kerja-kerja tersebut; dan (iii) adakah terdapat pembelaan penggunaan adil/urusan adil bagi defendan-defendan. Walaupun plaintif-plaintif memohon perlindungan untuk semua rancangan berita televisyen dan rancangan radio, bagi tujuan perbicaraan, mereka telah mengemukakan keterangan empat rancangan penuh berita televisyen selama 30 minit setiap satu, yang telah dilampirkan kepada afidavit bagi mematuhi s 42 Akta tersebut. Plaintif-plaintif juga telah menerbitkan salinan yang melanggar hak cipta melalui PW5, iaitu melalui belian perangkap. Defendan-defendan menegaskan bahawa plaintif-plaintif telah melanggar

Akta Komunikasi dan Multimedia 1998 ('AKM') dan oleh itu kewujudan hak cipta itu menjadi tidak sah.

Diputuskan, membenarkan permohonan plaintif-plaintif dengan kos:

(1) 'Pengarang' siaran rancangan berita televisyen merupakan individu atau entiti korporat yang menyiarkan rancangan itu jika dia atau ia mempunyai tanggungjawab untuk memilih kandungan rancangan berita televisyen tersebut, atau sesiapa yang menyediakan rancangan itu yang telah bekerjasama dengan individu yang menyiarkannya. Oleh itu, 'pengarang' suatu siaran merupakan penerbit siaran itu. Pengarang rancangan berita televisyen dengan itu adalah penerbit rancangan berita tersebut. Dengan membuktikan bahawa plaintif pertama adalah penerbit rancangan berita televisyen dan bahawa ia seterusnya menyerahkan semua hak-hak tersebut kepada plaintif keempat, plaintif-plaintif telah membuktikan pemunyaan rancangan berita yang mana memberi hak kepada siaran rancangan berita televisyen untuk layak mendapat perlindungan hak cipta di bawah Akta tersebut (lihat perenggan 111 & 117).

(2) Tiada salinan sebenar siaran rancangan radio atau rakaman bunyi yang telah dijadikan kepada bentuk tetap bagi rancangan radio tersebut. Tidak ada objek atau salinan yang boleh dirujuk oleh mahkamah sebagai 'kerja-kerja' berhubung perlindungan hak cipta siaran dan bunyi yang dipohon. Bagi tujuan membuktikan hak cipta dalam rancangan radio itu, adalah kewajipan plaintif-plaintif mengemukakan salinan sebenar, atau sekurang-kurangnya beberapa rancangan radio, sepertimana yang telah dilakukan oleh mereka untuk rancangan berita televisyen (lihat perenggan 127–128).

(3) Siaran rancangan berita televisyen plaintif-plaintif terangkum di bawah skop s 10 dan layak mendapat perlindungan hak cipta di bawah Akta tersebut. Sebagai seorang warganegara Singapura, mereka layak mendapat perlindungan hak cipta menurut peruntukan kesalingan dan kurniaan perlindungan dalam s 59A dan peraturan 4(1)(a) dan (b) Peraturan-Peraturan Hakcipta (Pemakaian Bagi Negara-Negara Lain) 1990 (lihat perenggan 133 & 169).

(4) Meskipun terdapat percanggahan kepada AKM, plaintif-plaintif secara keseluruhan tiada mens rea dalam 'melakukan' apa-apa kepenyalahan undang-undang. Ketidakpatuhan terhadap peruntukan-peruntukan AKM tidak menafikan plaintif-plaintif perlindungan hak cipta siaran (lihat perenggan 184).

(5) Oleh kerana plaintif-plaintif menikmati perlindungan hak cipta siaran di bawah Akta tersebut, defendan-defendan tidak bebas untuk merakam, menerbit semula sebahagian besar siaran tersebut sama ada

dalam bentuk asal atau dalam apa-apa bentuk yang dikenali berasal daripada yang asli, kecuali jika mereka mendapat kebenaran nyata atau lesen daripada plaintif-plaintif. Tindakan defendan-defendan membuat salinan rancangan berita itu secara keseluruhan bagi tujuan mengumpul, menyimpan, menyunting dan menjual atau menerbitkan semula sebahagian daripada segmen itu untuk dijual telah melanggar hak cipta siaran plaintif-plaintif dan hak cipta perfileman mereka dalam segmen pra rakaman terhadap siaran tersebut (lihat perenggan 188 & 193).

(6) Perkara-perkara yang perlu dipertimbangkan adalah sama ada penggunaan atau urusan 'fair dealing' yang dinyatakan dalam Akta tersebut termasuklah faktor-faktor berikut: (i) bagi tujuan urusan dan sama ada ia terangkum di bawah pengecualian yang ditetapkan dalam s 13(2)(a); (ii) sifat kerja itu; (iii) sama ada ia boleh dikatakan bahawa sebahagian besar kerja itu telah disalin atau digunakan jika dibandingkan dengan kerja asal; (iv) berdasarkan penilaian objektif apakah tanggapan yang terbentuk dengan urusan penerbitan semula/penyalinan itu; (v) kesan urusan itu terhadap potensi pasaran untuk, atau nilai terhadap kerja itu; dan (vi) apakah motif pihak dalam urusannya dengan kerja itu (lihat perenggan 215, 215(a)–(f)).

(7) Motif defendan-defendan dalam merakamkan secara berterusan siaran rancangan berita televisyen plaintif-plaintif adalah untuk mengumpul arkib maklumat bagi tujuan memberi data dan analisis kepada pelanggannya untuk suatu bayaran. Operasi defendan-defendan sebagai agensi pemonitoran media tidak terangkum dalam skop pengecualian statutori. Ia juga tidak terangkum dalam mana-mana pengecualian lain yang ditetapkan di bawah s 13(2) Akta tersebut (lihat perenggan 216(f) & 248).]

Notes

For cases on copyright generally, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5641–5750.

For cases on defence of fair dealing, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5699–5700.

For cases on infringement of copyright, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5687–5715.

For cases on ownership generally, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5731–5732.

Cases referred to

Asia Television Ltd & Anor v Viwa Video Sdn Bhd & Connected Cases [1984] 2 MLJ 304, FC (folld)

Aztech Systems Pte Ltd v Creative Technology Ltd [1996] 1 SLR 683, HC (refd)

Beloff v Pressdram Ltd and another [1973] 1 All ER 241, Ch D (refd)

CCH Canadian Ltd v Law Society of Upper Canada [2004] SCC 13, SC (refd)
De Garis & Anor v Neville Jeffress Pidler Pty Ltd (1990) 95 ALR 625, FC (refd)
Honda Giken Kogyo Kabushiki Kaisha v Allied Pacific Motor (M) Sdn Bhd & Anor [2005] 3 MLJ 30; [2005] 6 CLJ 174, HC (refd)
Hubbard and another v Vosper and another [1972] 1 All ER 1023, CA (refd)
Kelly v Arriba Soft Corporation 336 F 3d 811, CA (refd)
Pacific and Southern Company Inc Wxia-Tv v Duncan Tv 744 F 2d 1490, CA (refd)
Pro Sieben Media AG v Carlton Television Ltd [1998] FSR 43, CA (refd)
Sayre v Moore (1785) 102 ER 139n (refd)
Sillitoe v McGraw-Hill Book Company (UK) Ltd [1983] 9 FSR 545 (refd)
Solid Gold Publishers Sdn Bhd v Chan Wee Ho & Ors [1998] 5 CLJ 735, HC (distd)
Television New Zealand v Newsmonitor Services Ltd (1993) 27 IPR 441 (refd)

Legislation referred to

Communications and Multimedia Act 1998 s 4, 4(3)
Copyright Act [SG] s 35(2)
Copyright Act 1985 [CAN] s 29
Copyright Act 1987 ss 2, 3, 7, 7(1), 10, 10(1), (2), 13, 13(2), 13(2)(a), (l), 15, 15(1), (2), (3), 26, 26(1), (2)(b), 27(3), 42, 42(1)(a)(ii), 42(2), 59A, 59A(1)(d)
Copyright (Application to Other Countries) Regulations 1990 regs 2, 3(a), 4, 4(1)(a), (b), (e), Schedule 2
Copyright, Designs and Patents Act 1988 [UK]
Films (Censorship) Act 1952
Malaysian Communications and Multimedia Commission Act 1998

Celine Chelladurai (Zaid Ibrahim & Co) for the plaintiffs.
Benjamin J Thompson (Thompson & Associates) for the defendants.

Nallini Pathmanathan J:

INTRODUCTION

[1] The plaintiffs in this case comprise the leading broadcasting and media group of companies in Singapore. They are also established in Asia. Collectively they are known as the 'MediaCorp group' and collectively they produce and deliver information and news to the public through the medium of television, radio, newspapers, magazines, movies and out of home media. The defendants on the other hand collectively comprise a group of companies incorporated in Malaysia which provide an integrated print/radio/television monitoring agency to their diverse set of clients. Their operations span the major South East Asian nations. Essentially the group, known as the MediaBanc group, monitors and compiles selected television news

programmes and commercials, radio news programmes and commercials, and newspaper and magazine advertising on a continuous basis. Such data and information is collected, compiled, catalogued and archived in a database. Clients of MediaBanc routinely require information and particulars of the exposure they have received in the media. Alternatively they have queries with regards to the media exposure of other entities or persons. MediaBanc, as a monitoring agency, is able from its compiled databank to meet its clientele's requests by providing, for a fee, such particulars, data and information requested for, provided they possess it. When providing this data to their clients MediaBanc routinely support and back up the information and data provided with clips of news segments and commercials from their database. It is this last feature, namely the provision of, inter alia, clippings of news segments or commercials from the radio, television and other media which were produced, authored and delivered by the MediaCorp group of companies that has given rise to the dispute before this court. The plaintiffs maintain that the defendants' continuous recording, compiling and archiving of their broadcasts and media programmes amounts to a breach of copyright, as the plaintiffs have accorded no licence nor consented to the defendants' use of such data and information broadcast and produced by them. The defendants however maintain that their compilation, categorisation and archiving of such broadcasts does not amount to a breach of copyright. They further maintain that even if the plaintiffs are able to establish a breach of copyright their relatively restricted use of such data as a monitoring agency amounts to 'fair use' falling within the purview of s 13 of the Copyright Act 1987.

[2] It is to be noted at the outset that the plaintiffs are not pursuing their claims in infringement of trademark and passing off and therefore these causes of action are no longer relevant in the adjudication of the dispute.

ISSUES

[3] The primary issues that arise for consideration are as follows:

(a) Have the plaintiffs established ownership of copyright in the television and radio news programmes produced and broadcast by them?

(b) Have the defendants infringed the plaintiffs' copyright in the works above, and if so which acts of the defendant constitute infringement?

(c) Is the defence of fair use/fair dealing available to the defendants?

THE TRIAL

[4] The trial of this matter took place over a period of four days. Eleven witnesses were called to testify, seven for the plaintiffs and four for the

defendants. The plaintiffs' witnesses were:

(a) Joanne Leow, PW1 ('PW1') a producer-presenter of news with the fourth plaintiff, MediaCorp Pte Ltd;

(b) Teo Chia Leen, PW2 ('PW2') an executive editor with the fourth plaintiff, MediaCorp Pte Ltd;

(c) Adelene Koh, PW3 ('PW3') a manager in programme sales and marketing with the fourth plaintiff, MediaCorp Pte Ltd;

(d) Yasmine Yahya, PW4 ('PW4') a business reporter with the fourth plaintiff, MediaCorp Pte Ltd;

(e) Nur Ezza Saad, PW5 ('PW4') an operations manager with a private investigator's firm, Radall Gateskill Risk Management; and

(f) Yong Chung Jin, PW6 (PW6') the assistant vice president for programme sales and marketing with the fourth plaintiff, MediaCorp Pte Ltd; and

(g) Benjamin Loh Tse Min, PW7 ('PW7') legal counsel for the MediaCorp group of companies.

[5] The defendants' witnesses were:

(a) Badri bin Mohamad Saaid, DW1 ('DW1') the marketing director of one Sportswork Group Sdn Bhd;

(b) Choy Su Ling, DW2 ('DW2') a public relations consultant;

(c) Lim Leong Wouh, DW3 ('DW3') the chief executive officer for the MediaBanc group of companies, who is also a director of the first, second, third, fourth and fifth defendants; and

(d) Ghazalie Saw bin Abdullah, DW4 ('DW4') a public relations consultant who runs his own public relations practice.

THE EVIDENCE

[6] Three bundles of documents were produced in court. Most of the documents were in Part A or B. The placement of documents in Part A meant that the plaintiffs and the defendants were agreed on the issue of the authenticity of the documents as well as their contents. Documents placed in Part B meant that while the authenticity of the documents were not in issue, thereby precluding the need to call the maker of those documents, their contents remained in dispute. Given that the majority of the documents were in Part A or B, it was agreed by all parties that there was no necessity to mark

each and every document adduced in court. The documents in Parts A and B would be referred to by the parties in accordance with the page number on which they appeared.

[7] There were a few documents in Part C. In so far as these documents were concerned, where the very validity of the document was in issue, the maker had to be called or submissions made on the admissibility of the documents prior to their being admitted or marked in evidence. Accordingly only the documents in Part C and separately produced exhibits relating to the establishment of ownership of copyright under s 42 of the Copyright Act 1987 were marked individually as exhibits. From the totality of the evidence adduced through the 11 witnesses, the following facts could be gleaned.

SALIENT FACTS

The parties

[8] The first plaintiff owns and operates in Singapore a free-to-air news channel known as Channel NewsAsia and is also the producer of all news bulletins broadcast on the plaintiffs' television channels such as 'Channel 5', 'Channel 8', 'Channel U', 'Suria' and 'Central' pursuant to respective commissioning agreements with the third plaintiff and MediaCorp TV12 Singapore Pte Ltd, all of which were produced in court.

[9] The second plaintiff owns and operates in Singapore the following radio stations which broadcast in four different languages: (i) Gold 90.5FM; (ii) Class 95FM; (iii) 98.7FM; (iv) 93.8LIVE; (v) Symphony 92.4FM; (vi) Lush 99.5FM; (vii) Capital 95.8FM; (viii) Love 97.2FM; (ix) YES 93.3FM; (x) Warna 94.2FM; (xi) Ria 89.7FM; (xii) Oli 96.8FM; (xii) The International Channel; (xiii) Radio Singapore International; and (xiv) SmartRadio.

[10] The third plaintiff is a terrestrial broadcaster and owns and manages 'Channel 5', 'Channel 8' and 'Channel U'. Many of these television and radio programmes may be viewed in Johore Bahru and selected parts of Malaysia.

[11] The fourth plaintiff is the parent company of the first, second and third plaintiffs. As of 1 April 2008 the first and second plaintiffs assigned their entire ownership of copyright in their television news programmes and their radio programmes respectively to the fourth plaintiff (this has not however been pleaded in the statement of claim).

[12] The defendants are a part of the MediaBanc group of companies as described above in the introduction, whose primary activity and operations centre around media monitoring. The defendants monitor print, radio and

A television content and provide media monitoring services to governmental and non-governmental organisations.

The plaintiffs' complaint

B

[13] Yong Chung Jin, PW6 ('PW6') who is the Assistant Vice President of Business Development of the fourth plaintiff was the main witness on behalf of the plaintiffs' group of companies. PW6 set out the chronology of events leading up to the dispute.

C

[14] He testified that the entire dispute between the plaintiffs and the defendants arose in January 2006 when he received information from a client/customer on 12 January 2006 that a company known as 'MediaBanc Singapore' had approached this customer with the offer of providing footage D and/or media clips that it, MediaBanc taped off-air from various television stations including Channel NewsAsia.

[15] Upon receiving this information, PW6 visited MediaBanc Singapore's website and discovered that it was in actual fact the first defendant, MediaBanc E (Johore Bharu) Sdn Bhd. On the same day, ie 12 January 2006, he wrote an email to the general email address of MediaBanc Singapore. In this email he sought to verify from the first defendant whether MediaBanc could provide footage or media clips which it had taped off-air from, inter alia, Channel F NewsAsia and whether there was any form of licensing arrangement between MediaBanc and Channel NewsAsia.

[16] He received a reply from 'MediaBanc Singapore' the following day, on 13 January 2006 when a Ms Kiang So Peng called. PW6 asked Ms Kiang G whether the first defendant had obtained a licence or the consent of the first plaintiff to provide such footage and/or media clips. PW6 recorded and confirmed the contents of his conversation with Ms Kiang in an email dated 13 January 2006. In this email, PW6 states that Ms Kiang had mentioned that MediaBanc recorded news footage off Channel NewsAsia and Channel H NewsAsia International, and then sold copies of the same to third parties. PW6 then advised that such recording, reproduction, sale or distribution of its programmes without the permission of the plaintiffs amounted to an infringement of the plaintiffs' copyright in such programmes. Notwithstanding this, the plaintiffs maintained that they were willing to meet I with the defendants on a 'without prejudice' basis to resolve this issue. PW6 requested that the defendants cease any continued recording and sales of its media content pending the full resolution of the matter. A meeting was fixed for 18 January 2006 at the plaintiffs' offices. However this 'without prejudice' meeting was not successful and no resolution was reached.

[17] While the plaintiffs were considering their next course of action, PW6 stated that he was sent an email dated 28 June 2006 by one Adelene Koh. This email contained in turn an email from an organisation known as TMC Education Corporation which forwarded an email from 'MediaBanc Singapore' or the first defendant offering TMC Education Corporation clippings of television broadcast coverage on the institution which had been aired on 26 June 2006 on both Channel NewsAsia and Channel U. These clippings were offered for sale by the first defendant to TMC Education Corporation.

[18] On or about 4 July 2006 an employee of the first plaintiff forwarded an email she had received to PW6. This email was from the Victoria School which had in turn also been approached by 'MediaBanc Singapore' to offer for sale clips of the television broadcast coverage on Victoria School entitled '300 Schools to Take Part in Festival Offering Talks for Parents' which aired on one of the plaintiffs' television channels, Channel 8 on 28 June 2006.

[19] Upon receipt of this information the plaintiffs sought legal advice. They also instructed their solicitors to retain the services of a private investigator to obtain further information pertaining to the MediaBanc group and to conduct trap purchases. The private investigator who conducted these trap purchases, Nur Ezza Saad, PW5 ('PW5') testified in court. She stated that the first plaintiff instructed her employer, Randall Gateskill Risk Management to conduct a series of trap purchases with respect to various news programmes relating to Channel NewsAsia, Channel 8, Channel 5, Channel U, Suria and others on 8 August 2006. The plaintiffs wanted to procure a copy of the video clips or other recordings made by MediaBanc, as well as any other advertising or marketing material issued by MediaBanc. The purpose was to ascertain the scope of MediaBanc's activities, particularly in relation to the recording and sale of the plaintiffs' media content.

[20] The first trap purchase was conducted on 11 September 2006. The second defendant, MediaBanc (Malaysia) Sdn Bhd was approached by PW5 and requested to provide random clips of television news broadcasts aired in respect of:

(a) the Singapore's integrated casino resort;

(b) the Singapore-KL air route; and

(c) the luxury terminal in Changi airport,

from any channel. MediaBanc (Malaysia) Sdn Bhd referred the matter to MediaBanc (Johor Bharu) Sdn Bhd, the first defendant. One week later, on 18 September 2006, the first defendant reverted to the second defendant with news clips from both television and radio sources which included Channel 8,

Channel U, Channel 5, Suria, Channel NewsAsia, Central and 93.8FM. The clips offered for sale by the defendants had been copied directly at the various times of broadcast on various dates from the plaintiffs' channels. The sale price for these clips was RM120 per clip. PW5 agreed to purchase all the clips whereupon 17 such clips were purchased from the second defendant. The clips were collected on 25 September 2006 in a compact disc format. A purchase order, invoice and original receipt were given to PW5.

[21] When these news clips were played it was evident that the devices and trademarks of each television channel could clearly be seen on the screen. No attempt was made to delete, fade-out or mark-out the plaintiffs' names. When providing the news clippings sought by the plaintiffs in the first trap purchase, the second defendant of its own initiative advised PW5 that in the event they required more news clips from early 2005, the second defendant was able to provide the same. Accordingly the plaintiffs decided to accept the second defendant's invitation and conduct a second trap purchase. Therefore on 11 October 2006 the second defendant was again approached by PW5 with a request for television news broadcasts aired in respect of the Singapore Government's announcements on the integrated resort of Sentosa in April or May 2005. The second defendant again referred the matter to the first defendant. In this instance the first defendant was unable to provide clips copied prior to June 2005. The first defendant did however have in its records up to 54 clips in respect of the relevant topic required between June 2005 and July 2006. These clips were again from the plaintiffs' various television channels and had been copied at the various dates and times of broadcast from various channels.

[22] For the service of tracking and compiling these clips within the specified period, the second defendant charged a service fee of Singapore dollars $2,400 and offered to sell each clip for RM66. There was an offer of a 50% discount on the fees for the tracking service if more than ten clips were purchased. PW5 purchased ten clips which were collected from the second defendant on 21 November 2006 in the form of a compact disc again, together with the requisite purchase order, invoice and receipt.

[23] A playing of this last compact disc also disclosed clippings of news segments from many of the plaintiffs' television channels, including Channel NewsAsia, Channel 5, Channel 8, Channel U, Suria and Central. Their devices or trademarks showed up clearly in these clippings and no attempt had been made to delete these marks. The compact discs and documents procured during the course of the two trap purchases were duly produced in court and marked.

[24] The plaintiffs then chose to play for the court four selected video clips:

(a) A clip on Channel NewsAsia comprising a segment within the 'Singapore Tonight' news which airs daily at 10pm. This particular clipping ('track No 4') was dated 23 August 2006, aired at 10.13pm and related to the construction of Marina Bay. The presenter was Cheryl Fox, the reporter Wong Siew Ying and the producer cum editor of the news was Bhagman Singh. This clipping, more particularly track No 4 was marked as exh P2A.

(b) The second clip was from Channel 5 which carried a news programme entitled 'News 5'. It was aired on 4 September 2006 at 9.33pm and related to the Singapore-KL Air route that was to be opened up. The newsreader, reporter and editor cum producer are all employees of the first plaintiff. This clip ran for two minutes and 27 seconds and was marked as exh P2B.

(c) The third clip was also from Channel NewsAsia on the 'Singapore Tonight' news. It aired at 10.11pm on 4 September 2006. The newsreader, reporter and editor/producer are all employees of the first plaintiff. This clip ('track No 3') ran for three minutes and is comprised in exh P2C;

(d) The fourth clip was from Channel 5 and aired during the 'News 5' programme on 13 September 2006 at 9.45pm. The topic featured was Changi airport's facelift of Terminal 2. Again the newsreader, reporter and editor/producer are all employees of the first plaintiff. This clip ('track No 2') ran for two minutes 58 seconds and is a part of exh P2D.

[25] From these clips shown to the court, the plaintiffs established that segments from their television news programmes had been monitored, copied, edited (in terms of clippings) and recorded into different media, ie compact disc form for sale to third parties for a fee.

[26] Apart from the foregoing, the plaintiffs discovered, as a result of the trap purchase investigations, considerable information about the operations and workings of the defendants. The private investigator discovered that 'MediaBanc Singapore' was based in Johore Bharu, that it was in reality the first defendant that conducted monitoring operations for the Singapore market. The second and third defendants, ie MediaBanc (Malaysia) Sdn Bhd and MediaBanc Group Sdn Bhd in turn, monitor the Malaysian media as well as the Asian market. The second defendant manages the centralised billing system for the group while the third defendant is an investment holding company and provides management services. The third defendant is a shareholder of the first, second and fourth defendants while the first and second defendants are shareholders of the fifth defendant. The fourth defendant provides analysis

services for the group while the fifth defendant is responsible for research and as an international marketing arm. Their clients ranged from governmental to non-governmental organisations and corporations such as Far East Organisation, Esplanade, IBM Media Development Authority, Daimler Chrysler and a host of other entities. This evidence given by PW6 was not denied by the defendants, nor was he cross-examined on the same, leading to the conclusion that it is true.

[27] Having secured information and data vide the trap purchases the plaintiffs on 22 January 2007 instructed its solicitors to first issue cease and desist letters requesting that the defendants cease infringing the plaintiffs' copyright in the news programmes it broadcast, immediately. Notwithstanding the issuance of such letters, the plaintiffs discovered at around the same time that another entity was approached by the first defendant or 'MediaBanc Singapore' offering for sale radio broadcast coverage on that entity which had been aired live on 17 December 2006 on the subject of school holidays. The offer was made by the first defendant at a discounted rate. Once again the plaintiffs' solicitors issued cease and desist letters to each of the defendants requesting that they cease all acts of infringement of the plaintiffs' news programmes.

[28] The first defendant on behalf of all the defendants responded by initiating negotiations with the plaintiffs with a view to achieving an amicable settlement of the matter. However once again a resolution was not reached. The plaintiffs were unwilling to continue negotiations as the defendants were not prepared to stop their operations relating to the recording, distributing, copying and selling of content recorded from the plaintiffs' news and radio programmes. As late as 13 April 2007 the plaintiffs learnt through an employee of the fourth plaintiff that the Ministry of National Development of Singapore ('MNDS') were approached by the MediaBanc group and offered for sale television broadcast news coverage which had been aired on Channel NewsAsia, Channel 8, Channel U and Channel 5 on 9 April 2007 relating to the reopening of a granite quarry.

[29] PW6 testified that as a consequence of the defendants' activities, which he maintained amounted to an infringement of the plaintiffs' copyright in the news programmes and radio programmes, the plaintiffs suffered loss and damage because the plaintiffs have a similar business. They too sell video clips and sound clips and generate income thereby. Accordingly PW6 maintained that they had lost the opportunity to earn income thereby as the defendants had sold infringing copies of their news clips from television and radio to third parties. Moreover, the plaintiffs were also concerned from the nature of the queries posed in the various emails referred to above, that the general public was misled into thinking or assuming that the plaintiffs and the defendants

were in some way associated. In short PW6 maintained that confusion had been established vis-a-vis, the general public, resulting in their being deceived into placing orders for video clips with the defendants rather than the plaintiffs, the owners of copyright in the television and news programmes in issue.

[30] PW6 also pointed out that as the defendants were monitoring, recording, copying, compiling and then selling these products without licence or authority from the plaintiffs, the defendants were able to price the sale of such clippings at a much lower rate than the plaintiffs. The plaintiffs had to factor into their price for such clips, the production costs they had borne, while the defendants had no such costs. The plaintiffs' grievance was that their reputation and good will would be irreparably injured if the defendants were allowed to proceed with their activities unchecked.

[31] PW6 went on to explain that the plaintiffs had obtained an interim injunction to restrain the defendants from carrying on with their operations in relation only to the monitoring, copying, recording and selling of clips taken from the plaintiffs' broadcasts on 27 November 2007 which remains in place pending the adjudication and determination of the parties' rights at trial. However PW6 maintained that the defendants continued to breach the injunction and set out instances when he believed such was the case. Accordingly committal proceedings had been commenced against the directors and country manager of the first defendant.

[32] In cross-examination, it was put to PW6 that the defendants had in fact referred clients to the plaintiffs to procure footage and clips. Learned counsel for the defendants, Mr Thompson, made reference to p 640 of the bundle B, an email from the defendants' employee to a client, advising them to contact the plaintiffs directly for footage. This email was dated 25 March 2009. PW6 however denied that this amounted to a referral from the defendants. He referred to an earlier email from the same client (at p 638 of the bundle B) where the client had written to PW6 directly and advised that she had procured the footage from MediaBanc. However PW6 did agree that if there had been any communication between the client and the defendants prior to 24 March 2009 that would have constituted a referral.

[33] PW6 was asked whether he could produce any independent evidence to support his claim that the plaintiffs are the leading media and broadcasting group in Asia. He conceded that there was no research or ranking that placed the group at number one but that this was essentially self ranking. He was also asked about the plaintiffs' reputation in Malaysia. He answered that he did not know but maintained that the channel was viewed in the southern part of Malaysia. Additionally the plaintiffs also have a few programmes that are broadcast by local Malaysian stations. He conceded that the plaintiffs had

neither commissioned nor subscribed to any surveys on their market share of viewership or listeners to the plaintiffs' television and radio broadcasts in Malaysia. He was also unable to estimate the number of customers or viewers the plaintiffs had in Malaysia.

[34] PW6 was next cross-examined on his contention that the plaintiffs own the copyright in the television programmes it produces. He was asked whether the plaintiffs had registered their copyright anywhere in the world, to which he responded that they had but he was not entirely sure where. However he was able to name Hong Kong and India as examples.

[35] He was then queried on the plaintiffs' reporters and whether they were all full time employees of the plaintiffs. PW6 replied that as far as he was aware, the reporters were full time employees of the plaintiff. He conceded that it was possible that some reporters were not full time employees. He claimed to be unaware that the plaintiffs obtained reports from freelancers. He was then queried specifically on the video clips in exhs P2B and P2C. Reference was made to the segment where a reporter by the name of Melissa Goh was reporting from Kuala Lumpur. The question was whether she was reporting through a live feed or whether it was pre-recorded. PW6 stated that it 'should be' pre-recorded. It was put to him that in some situations the plaintiffs had to rely on live feed and the reporter would be outside their studios and the news live. PW6 agreed.

[36] PW6 was asked about the supply of third party news footage from for example Reuters. He explained that the plaintiffs could use such footage as they had a licence to do so in accordance with the terms and conditions of such licence. He was asked whether such licence allowed him to transmit the clip outside of Singapore and he answered that the plaintiffs were not allowed to do so for all channels.

[37] PW6 was then queried as to live presentations from the studio. He conceded that in the case of live feeds, there would be a lapse of a few seconds between the person speaking in the studio and the exact time when it could be viewed by the public in their homes. He estimated such a time lapse to amount to between 0.1 seconds and 2–3 seconds depending on the types of transmission.

[38] PW6 also confirmed that his answers in relation to television programs were equally applicable to radio programmes.

[39] As for the format of the recording done by the plaintiffs, PW6 explained that a few formats were adopted, DVD, low resolution format and beta tapes. He was then queried on the pricing for these various formats. He explained that

the DVD format cost Singapore dollars $400 per clipping. This was recorded live and such a copy would take seven working days to be delivered. However a lower resolution copy would take less time.

[40] It was put to PW6 that while clients of the defendant required media monitoring services from the defendants, they still sought clips directly from the plaintiffs. PW6 essentially agreed.

[41] Next learned counsel referred to PW6's earlier statement that in the news programmes produced as evidence in court there were segments where the copyright belonged to the plaintiff, segments from Reuters and segments which are paid advertisements during the news bulletin. He asked PW6 whether it was wrong for someone to record the segment licensed to the plaintiffs by Reuters. PW6 responded by stating that it could be recorded for their own viewing. He also conceded that he could not take action against someone who recorded the segment from a third party such as Reuters, or the commercial breaks. PW6 maintained that the news clippings belonging to the plaintiffs could be recorded for private viewing.

[42] Next focus was placed on the trap purchases. PW6 conceded that his evidence relating to the same was premised on what he had learnt from PW5. He also agreed that in the investigation it was PW5 who approached the defendants and sought specific services. The contention put to PW6 was therefore that the services offered in the trap purchase were not the same services they were providing to other clients. PW6 disagreed.

[43] PW6 was then questioned about the trademarks and devices apparent on viewing the news clips. He maintained that even if the devices or trademarks were deleted or faded out, the viewer would know which station broadcast that clip.

[44] Questioning then ensued on the issue of 'confusion' between the plaintiffs and the defendants. It was suggested that such confusion was caused by the branding strategy adopted by the plaintiffs which PW6 denied. He went on to explain that some customers thought that MediaBanc had been licensed or appointed by the plaintiffs. It was suggested that this was an isolated as opposed to a general viewpoint but PW6 disagreed, citing other instances when various Ministries had asked if the defendants and the plaintiffs were related.

[45] PW6 was asked whether it could be discerned from footage obtained from the plaintiffs or any other party, where such footage was from or where it was sourced. PW6 maintained that it was not discernible from the footage as to where it was sourced. He agreed that none of the plaintiffs' trademarks or

devices were on the cover of the compact disc. He further agreed that anyone receiving a report on the compact disc produced in court would not be deceived as to the source of the content on it, and that the quality of the recording on the compact disc was not of a high quality. PW6 also agreed that the plaintiffs did not provide media monitoring services but a library and retrieval service.

[46] PW6 was also questioned on whether the plaintiffs were registered under the Communications and Multimedia Act 1998 and conceded that they are not. He could not tell whether the plaintiffs ensured that their content complied with the Malaysian Communications and Multimedia Content Code or the advertising code. It was put to him that the plaintiffs were unlicensed to operate or broadcast in Malaysia.

[47] Essentially in cross-examination PW6 was challenged on the issue of their entitlement to establish or enforce copyright when they were not registered licencees under the Malaysian Communications and Multimedia Commission Act. The bulk of PW6's recital of the chronology of events leading up to this dispute is not in issue.

The evidence of PW5, the private investigator

[48] One of the other witnesses for the plaintiffs included the private investigator, PW5 who gave detailed evidence relating to the trap purchases conducted. The salient particulars relating to the trap purchase have been outlined above and I do not propose to repeat PW5's evidence into here. She did however particularise in greater detail the evidence given by PW6. PW6 essentially relied on her report to explain their response to the defendants' activities.

[49] PW5 produced the relevant emails evidencing the procuring of recorded and archived clippings of television news programmes which had been monitored and recorded free from the air by the defendants before being categorised and archived. She also gave evidence that she went to the business premises of the second defendant to collect the video clips. In the course of her meetings with the defendants' employees she found out that all Singapore television and radio channels were monitored by MediaBanc's Johore Bharu branch while Malaysia's television and radio channels were monitored by MediaBanc (Malaysia) Sdn Bhd, the second defendant. PW5 also managed to procure a company profile, a list of media sources monitored by MediaBanc and its account number. The list of media sources monitored, recorded, copied and compiled for the country Singapore lists (at p 484 of the bundle B) for television Central, Channel 5, Channel 8, Channel U and Suria. As for radio

stations there is a long list of stations monitored including, inter alia, Radio 93.8FM, Radio 94.2FM, Radio 95.8FM, Gold, Love, Yes and Ria.

[50] In cross-examination PW5 confirmed that her scope of work was to obtain a copy of a video tape or such other record from MediaBanc. She further confirmed that her sole contact with the defendants was through Nur Elida Amin or 'Ally' with whom both the transactions had been conducted. She was unable to state whether the services she required of MediaBanc were the usual services provided by the defendants. In essence, PW5's evidence was not challenged substantively during the course of cross-examination thereby corroborating the veracity of the two trap purchases. The other witnesses for the plaintiffs were Joanne Leow Chuang Ching, PW1 ('PW1') a news presenter with the fourth plaintiff, who in 2006 was a reporter with the first plaintiff. Her evidence centered on the production of the email dated 4 July 2006 from the Victoria School, referred to earlier, where the school advised that they had been approached by MediaBanc with an offer of the sale of clips of television broadcast coverage on the school. She explained that she had received the email from the vice principal of the school asking her to take note of the offer from MediaBanc. The email was duly produced. There was no dispute as to the receipt of this mail by the plaintiffs.

[51] The plaintiffs second witness was Teo Chia Leen, PW2 ('PW2') who was in 2006 one of the assignments editors of Channel NewsAsia. Her job scope then was to look through the news releases that came through email and faxes and to decide on the news coverage for the day. Her evidence centered on the receipt of an email from the Ministry of National Development of Singapore dated 13 April 2007 where an employee there had written advising that they were offered for sale television broadcast news coverage which had been aired on the plaintiffs' television channels. PW2 testified that it appeared to her that MNDS was unsure whether Mediabanc was affiliated to the plaintiffs. Again her evidence on this point was not challenged in the course of cross-examination. It follows that the defendants do not dispute that these offers of sale of news clippings were made by the defendants to MNDS and the Victoria School.

[52] The third witness for the plaintiff was one Adelene Koh, PW3 ('PW3') who in 2006 was involved with the distribution of news content, programme content and footage within Singapore and international markets. The type of content that she was distributing then included news programmes, current affairs and documentaries belonging to the first plaintiff. She too produced an email dated June 2006 whereby the TMC Educational Group Pte Ltd was approached vide one Jeremiah Koo by MediaBanc. They offered the company clips of television broadcast coverage on the group which had been aired on Channel NewsAsia and Channel U on 26 June 2006. In cross-examination,

PW3 confirmed that her testimony as to the receipt of the email was based on her memory. She stated that she could recall it because it was not a common email that was received daily. It was put to her that the email tendered in court contained no communication from the said Jeremiah Koo. PW3 disagreed maintaining that she did indeed receive such an email. She was then referred to an email exchange between an employee of MediaBanc and Jeremiah Koo and asked if she meant that email. When asked why her name did not appear, she explained that the email had been received in 2006 and that her email records had been lost as of October 2008. Hence her name was not there. PW3 then went on to state that while she could not remember precisely what emails she received over that period, she could recall Jeremiah Koo's email because it was an uncommon one that she did not normally receive in the course of her work. In essence the truth of her statement as to whether or not she received such an email was challenged. While there is no email to corroborate her version of events, it cannot be doubt from the email records before the court that an offer for the sale of news clippings was indeed made to the TMC Educational Group Pte Ltd. That fact is not in doubt and is the main fact of relevance to the dispute here. Whether or not PW3 received the email from Jeremiah Koo is of no real relevance.

[53] The plaintiffs' fourth witness was Yasmine bt Yahya, PW4 ('PW4') who in 2006 was a news journalist with 93.8LIVE radio station of the fourth plaintiff. She gave evidence that she was the recipient of an email from one Adam Khoo Learning Technologies. The organisation had copied an email to her on 5 January 2007 which was addressed to an employee of MediaBanc. In the email Adam Khoo Learning asked MediaBanc's employee whether she was associated with 93.8LIVE radio station. PW4 testified that from the history of that email it appeared that the employee had offered Adam Khoo the sound clip of a news story which PW4 had conducted with the organisation. The offer to sell that sound clip was for the price of Singapore dollar $65. PW4 was not able to produce her response to this email as she had deleted the same but she explained that there was no nexus between MediaBanc and the plaintiffs.

[54] In cross-examination, learned counsel for the defendants sought to take objection to the email, not having done so earlier. The essence of his objection was that the email was incomplete. However there was no dispute about the offer for sale by MediaBanc employee to Adam Khoo Learning Technologies. This is the relevant document for the purposes of this case, not the email to PW4 forwarding this email. In these circumstances the objection did not go to the root of the issue relating to whether or not an offer for the sale of the sound clip had been made. As such the plaintiffs successfully established that MediaBanc had been making offers of sale of radio clips produced by the plaintiffs to a third party. In view of the absence of the email to PW4 however,

it was not possible to conclude with certainty that confusion had been created in relation to the identity or a possible affiliation between the plaintiffs and the defendants.

[55] Apart from these witnesses, the plaintiff also sought to reopen its case after submissions had commenced at the close of trial. While the defendants were submitting on the issue of copyright ownership and entitlement, the submission was made that the plaintiffs had failed to establish copyright in the news segments produced, inter alia, because they had failed to produce in court some sample of the original works in respect of which it was maintained that copyright had been infringed. In other words, the defendants maintained that it was incumbent upon the plaintiffs to put forward a sample original sound recording or visual recording which they claimed had been infringed.

[56] It then became apparent that there was a lack of agreement between the parties on this issue. Learned counsel for the plaintiffs, Ms Celine Chelladurai submitted that it was an agreed fact between the parties that ownership of copyright vested in the plaintiffs. Mr Thompson for the defendants had however commenced his submissions by attacking this issue. He maintained that it had never been an agreed fact that copyright subsisted in the plaintiffs. A perusal of the statement of agreed facts filed discloses that the parties agreed, inter alia, that:

(a) the first plaintiff owns and manages Channel NewsAsia and Channel NewsAsia International and is a producer of news and current affairs programmes in the South East Asia region;

(b) the second plaintiff is a radio broadcasting corporation in Singapore, operating Singapore's largest radio network with 13 radio stations;

(c) the third plaintiff is a terrestrial broadcaster which owns and manages Channel 5, Channel 8 and Channel U; and

(d) the fourth plaintiff is the holding company for the first, second and third plaintiffs.

[57] On the basis of these agreed facts it was the plaintiffs' contention that the subsistence of copyright in the plaintiffs was not in issue. Mr Thompson for the defendants contended otherwise. He maintained that agreeing to the foregoing did not amount to agreeing or admitting that copyright in media content subsisted in and was owned by the plaintiffs. In these circumstances Ms Chelladurai for the plaintiffs made an application to reopen the plaintiffs' case. She submitted that the plaintiffs had crafted its entire case based on the agreed facts and agreed main issues. On that premise the plaintiffs claimed to have understood that the establishment of copyright was not in issue.

[58] A perusal of the defence discloses that at paras 6 and 7 the defendants put the plaintiffs to strict proof in respect of their claims that they are the producers and broadcasters of the television programmes. More importantly they deny that the first plaintiff is the owner of copyright in the news programmes referred to in the statement of claim as alleged and put the plaintiffs to proof. In para 8 the defendants elaborate further on why the plaintiffs 'cannot possibly own' copyright in and to all sale, distribution, telecase, exhibition and production rights in Malaysia. Similar averments have been pleaded vis-a-vis ownership in copyright in radio programmes thereby denying that the second plaintiff is indeed the owner of copyright in the radio programmes.

[59] The court considered the request put forward by the plaintiffs with some caution. It did not appear to this court to follow from the statement of agreed facts that the defendants had conceded or admitted that copyright in the television and radio programmes which the plaintiffs claimed to have produced, vested in the plaintiffs. The defendants appear to have required the plaintiffs to prove such copyright. The plaintiffs therefore sought to reopen the case so as to introduce an affidavit to meet s 42 of the Copyright Act which allows for the establishment of prima facie ownership of copyright thus. The court finally allowed the plaintiffs' application in the interests of justice, so as to avoid a situation whereby the claim would be adjudicated without a full consideration of the issues raised in the course of the suit.

[60] As the application was allowed, the plaintiffs introduced an affidavit under s 42 of the Copyright Act vide one Benjamin Loh Tse Min, legal counsel for the plaintiffs. The said witness, PW7, produced the affidavit affirmed by PW6 pursuant to s 42 of the Copyright Act 1987. The affidavit is dated 27 August 2009 and states, inter alia, as follows:

(a) that PW6 is the assistant vice president of the fourth plaintiff and has been authorised by it to make the statutory declaration on their behalf;

(b) the fourth plaintiff is involved in the business of broadcasting television programmes and related services in Singapore;

(c) the first plaintiff (which is related to the fourth plaintiff) produced through its employees the news segments from which the news clippings produced in court as exhs P2C and P2B were taken.

(d) true copies of the news programmes which were aired on the respective dates at various times on the two television channels were produced in the form of digital video discs ('the works').

(e) PW6 further affirmed that the editors and producers of the news in the said works were as he had testified earlier, Bhagman Singh, Cheryl

Lim, and Hwee Goh who are all employees of the first plaintiff. In essence they were therefore the authors.

(f) PW6 affirmed that the first plaintiff had assigned all its rights and interests in the works had been assigned to the fourth plaintiff on 1 April 2008. He further stated that in keeping with the provisions of the Singapore Copyright Act (Cap 63), the copyright in the said works was deemed to be transferred to the first plaintiff, as the authors were all employees of the first plaintiff with effect from the respective dates of their creation until 1 April 2008 when the copyright vested in turn with the fourth plaintiff by reason of the assignment as explained earlier.

(g) PW6 concluded by averring that the works were eligible for copyright under the Copyright Act 1987 and that accordingly copyright subsists in Malaysia in the said works, which he asserted.

[61] Thus the plaintiff finally closed its case.

The defence case

[62] The defendants called several witnesses in support of its case. The primary witness was Lim Leong Wouh, DW3 ('DW3'), a director of the first, second third, fourth and fifth defendants. DW3 explained that he has been with the MediaBanc group since July 1997 when he established MediaBanc (Malaysia) Sdn Bhd, the second defendant together with two other partners. He was the general manager of the first and second defendants up to 2001. Since 2001 he has assumed the position of chief executive officer for the MediaBanc group. Daily operations of the various entities in the group are managed by country managers and a regional country manager.

[63] DW3 then went on to describe the operations of the group. Essentially the MediaBanc group of companies are media monitors. They have more than 250 employees in Malaysia, Singapore, Indonesia, Philippines, Thailand and Vietnam. In each of those countries the MediaBanc group of companies monitor print media, television, radio and online media on behalf of its clients. MediaBanc consider themselves pioneers in this business in Malaysia and Singapore and according to DW3 are striving to develop the market in this field.

[64] DW3 then went on to explain why its clients required their services, essentially for corporations or persons to ascertain information on what is said about them or their industry, their competitors or their products in the mass media. Their clients include political parties, government agencies, educational institutions, banking institutions, healthcare institutions and public relations

firms. He summarised the function of a media monitoring entity as one that performed a guarding and analysing function or a monitoring and analysing function vis-a-vis the media for its clients, thereby allowing them to gauge public feedback and take measures to address such feedback or assist in the measuring of the performance of the entity. In view of the extensive media coverage in several forms that is current today, many organisations are unable to cope with the task of guarding and measuring information.

[65] DW3 maintained that media monitoring is a complementary business not a competitive business to that of media owners. When asked why he had not offered to pay the media owners a licence fee and arrive at a commercially viable arrangement, he explained that the defendants had attempted to do that from the onset, even prior to the commencement of this suit or the injunction. However the area of dispute between the plaintiffs and the defendants was the rates insisted on by the plaintiffs. The rates demanded, according to the defendants were far in excess of what they could afford. Additionally the parties could not agree on another area. The plaintiffs wanted the defendants to stop recording and instead obtain segments of the news from them which would take up to seven working days. This time lag was too long for the defendants who needed to analyse, catalogue and archive the information far more quickly. As such all attempts to resolve the matter failed.

[66] DW3 then explained how the media monitoring process was conducted. The 'heart' of the media monitoring system, he explained, is the software engine into which the defendants feed information and data acquired through their review and research of all forms of media. This software engine, developed by the defendants since 1997, is called the MediaBanc Information System ('MIS'). The copyright in the software and underlying database is owned by the third defendant. The MIS has two interfaces, the client interface and the operator interface. The process of media monitoring, DW3 explained, occurs as follows:

(a) Trained operators of the first defendant review various sources of current news media and identify instances of the mention of company names, brand names and other phrases of current interest. This can be a complex process as it is necessary to identify and recognise all instances of mention at the time of the media broadcast, notwithstanding that there are several voices speaking at the same time, at different speeds and in foreign accents.

(b) To overcome this problem and to ensure an accurate review the first defendant records the transmission of the news broadcast onto video or audio tapes, to enable the operators to rewind the tapes and relisten or review the difficult portions of the broadcast or to seek assistance on the same.

(c) The used tapes are then reused for recording ie overwritten with other content according to a tape rotation schedule.

(d) The operators then use the operator interface of the MIS to enter information into the database, citing for example the name or phrase in question, the news programme on which it was mentioned, the date and time of the news programme, the channel on which it was aired, a short headline as to the context of the mention and the category of news and industry into which the mention falls.

(e) Analysts employed by the first defendant then use the MIS to statistically review the instances of mention. The fourth defendant uses the MIS and underlying database to perform advanced research for its clients — for example both qualitative and quantitative measurements for its clients' management purposes.

[67] DW3 explained that clients who retained the defendants or subscribed to their outsourcing services were advised on a daily basis of the instances in which their name, their competitior's names, their industry or other pre-determined subjects of interest were mentioned over the television and radio media during the previous day and that very morning in the newspapers. The format of the report list provided enables the client to study, review, sort, evaluate and analyse the information according to their specific needs. As a consequence of the interim injunction procured by the plaintiffs, DW3 maintained that the defendants have suffered grave damage vis-a-vis the database and consequently the accuracy and comprehensiveness of their statistics and analysis as they have been prevented from making recordings even for their own research and analysis and for compilation of information.

[68] DW3 explained that to address these weaknesses the defendants sought legal advice on the 'fair use' provisions under copyright law that in the public interest allows for copying or reproduction under certain circumstances. Accordingly to meet the category of 'fair use' DW3 stated that the defendants' media monitoring services were provided in the following manner:

(a) At their request, the defendants' clients are provided with excerpts from the audio or video recordings so as to convey only the information as to the context in which their company or brand name was mentioned. For example they might get a two minutes excerpt from a 30 minutes news programme.

(b) The defendants ensure that they acknowledge the source of the excerpts as required under copyright law to qualify for fair use. The defendants add to the excerpt an extract from the very beginning of the programme and another extract from the end of the programme, so as to show the presenter and rolling credits.

(c) The watermark or other identifier of the TV station broadcasting the programme is in no way obliterated or otherwise distorted. The excerpt is digitally compressed before being made available to the clients to ensure that the quality of the excerpt is reduced and rendered unsuitable for rebroadcasting, re-recording or any other purpose.

(d) According to DW3 the clients are consistently notified that they are not to place the excerpts on their corporate websites or for it to be used in corporate videos. The charges are only in respect of compilation, editing and delivery. There is no charge for the excerpt. The defendants also do not offer for sale copies of whole news segments, nor rebroadcast the plaintiffs' programmes. They only review and analyse the programme for information which could impact their clients.

[69] DW3 was then asked to explain the actions of MediaBanc's ex-employee, one Kamaljeet Kaur who had sent emails to various organisations offering for sale copies of recordings made from programmes produced by the plaintiffs. DW3 stated in response that the defendants had to actively market their services in the market as the concept of media monitoring is still new to the public. In an effort to improve marketing and customer sales, it offered its employees remuneration based on the achievement of monthly targets and sales commissions. Kamaljeet, DW3 contended had acted outside the scope of her duties and authorisation in offering these video recordings and news segments to clients. She had since resigned and the defendants were unable to locate her.

[70] DW3 then sought to explain the trap purchases. He maintained that the two transactions had been conducted outside the scope of the standard operating procedures of the defendants. Again DW3 maintained that the sales person, Ally had been keen to earn a commission and exaggerated MediaBanc's activities to the private investigator, PW5.

[71] DW3 closed his examination-in-chief by explaining that MediaBanc had not sought to 'misrepresent' to the public in Singapore that the defendants are part of the MediaCorp group. This he explained was because the first MediaBanc company was incorporated in 1997, some 26 months before the first MediaCorp company.

[72] In the course of cross-examination, DW3 was asked how the MediaBanc group recorded various programmes. A specific example of a news programme from Channel NewsAsia was suggested. DW3 responded by explaining that in 2006 the defendants would have recorded the programme onto a VHS tape, but that in 2009 it would be directly onto a computer. On further questioning he explained that the VHS tape would then have been archived in that time, while on the computer it would be recorded onto the

hard disc. DW3 explained that no editing was done unless there were key messages that had to be picked up. In editing, DW3 explained that a computer programme allowing them to 'cut in' and 'cut out' was utilised. These edited news clippings were then archived separately.

[73] It was put to DW3 that the guarding and measuring or surveillance function he had talked about would normally be carried out by a public relations agency. DW3 replied that while that might have been true many years ago, it was not possible today for the reasons he had set out in examination-in-chief. When pressed further on this point, namely that the functions carried out by the defendants was the same as that of a public relations company, he responded by stating that a PR agency's main function is to strategise communication while media monitoring is part of the communications process.

[74] DW3 was asked whether, if a licence fee was due to the media owner, the defendants would build that cost into their fees. His response was that they might or might not. It would depend on the contract signed. He agreed that the defendants' companies would absorb a portion of the costs of the licence fees paid to the media owners.

[75] DW3 was then referred to the email from the defendants' country manager, one Ivan Chong to a client, one Desiree Lim (at p 640 of the bundle B). Desiree Lim he explained was a retainer client for print monitoring. He was asked to confirm that she received copies of video clips from the plaintiffs' news programmes in March 2009. DW3 refused to confirm that. When the email in issue was put directly to him, DW3 responded by saying that all that had been provided was an MIS report and that a direction had been given to approach the media owners directly. When pressed further, DW3 maintained that he was unable to confirm whether the defendant did or did not provide video clips to Desiree. A perusal of the relevant email from Ivan Chong to Desiree Lim dated 25 March 2009 states as follows:

> ... Dear Desiree, Yes the material that provided by us will only meant for Internal Research and Review purpose. Should you need to broadcast or show to the third party, you may need to purchase the copyright (for external use) from the media owner. Currently MediaBanc is the SPH's copyright distributor, as for MediaCorp, you will need to contact them directly ...

[76] It was then put to DW3 that an article entitled *When Information is King*, which was linked to the defendants' webpage, which contained an error, namely that MediaBanc had obtained a licence from MediaCorp for the use of its materials, served to mislead persons into believing that the MediaCorp material provided by MediaBanc was licensed. DW3 agreed with that but

maintained that the error had been corrected and that they had sent letters out to the 'core' of the Singapore market to advise them. DW3 was unable, however to produce any of those letters.

[77] DW3 was then referred once again to p 619 of the bundle B, an invoice to one PR Communications Pte Ltd, and asked whether the clippings referred to in that invoice, which were all the plaintiffs' programmes, were sold at $25 per clip. DW3 was unable to answer the question stating that he was unsure that the document was an invoice (notwithstanding that the document is headed 'Invoice' at the top). He also said that he did not know what the $25 was for.

[78] DW3 was then referred to advertising material on the defendants' group of companies at pp 477–482 of the bundle B. He was asked whether the price list at p 481 were standardised fees. DW3 explained that these were merely approximate fees or suggested fees. He maintained that there was no fixed for or retainer fee for video clips.

[79] The prices for the trap purchase were then put to DW3. He was also asked to confirm that when an ad hoc request was made, the defendants would provide the details as well as the video clips found. DW3 agreed. He also agreed that the sum of $120 was the price on an ad hoc request for a video clip alone.

[80] With respect to the trap purchases, it was put to DW3 that given his testimony above, the trap purchases did not comprise business outside of the standard operating procedure of the defendants as ad hoc video clips were provided at a price of $120 per clip. DW3 however disagreed with this.

[81] DW3 was also questioned on the discussions between the plaintiffs and the defendants in relation to the quantum of the licensing fee sought by the plaintiffs. DW3 maintained that in 2004–2005 the parties had a discussion where the licensing fee sought was two and a half times the defendants' revenue. In the 2007 discussions, DW3 contended that the fee sought amounted to about 140%–150% of the defendants' revenue. It was then put to him that the formula presented was on a 'per clip' basis as opposed to a flat fee. DW3 agreed. It was then put to him that the price suggested was in the range of $50 per clip. Again DW3 agreed stating that it was in the region of $52 per clip.

[82] DW3 was then queried on whether a client could access data stored in the MIS. DW3 replied that they could not have access to the recorded programmes and news. However the defendants would be able to access the archive and provide it within a time frame ranging from two weeks to 30 days. DW3 also explained on being questioned, that material recorded for a client

was not stored indefinitely but in CD format for about six months and if in VHS format for about 28 days or one month. It was however put to him that this was not possible as in the trap purchase scenario, the defendants had been able to provide data more than one year prior to the recording. DW3 explained this by maintaining that the information requested for was from a retainer client, for whom material was stored for up to a year or so. DW3 also explained that the video clips were sourced from the archive by the use of a search through keywords.

[83] Reference was made to DW3's earlier evidence that the defendants' clients were advised that the video clips were strictly for their own viewing and research purposes. He was asked where on their invoices or delivery orders or their website it was stated that they provided these clips. DW3 conceded that he could not recall anywhere in their advertising material that such a warning was carried. DW3 relied on two cases where queries for the video clips were referred back to MediaCorp Singapore.

[84] It was next put to DW3 that the defendants had succeeded so well in their media monitoring business because of the low pricing of its material. DW3 disagreed. He also disagreed that he would still be able to conduct the defendants' business successfully if their products were priced slightly higher.

The other witnesses for the defence

[85] The other witnesses for the defence, namely Badri bin Mohamad Saaid, DW1 ('DW1') a marketing director with a sports marketing consultant, Choy Su Ling, DW2 ('DW2') a public relations consultant, and Ghazalie Saw bin Abdullah, DW4 ('DW4') a public relations consultant all related why in the course of their work and other activities, media monitoring assumed such an important role. They also explained their need for the edited news 'clippings' or segments provided by the defendants which assisted them in their daily duties and functions.

[86] In cross-examination most of the defendants' witnesses testified that they relied upon the clippings or segments made available by the defendants from recordings of the plaintiffs' broadcasts to comprehend and accurately summarise the data and news contained in such broadcasts. For example DW1 maintained that as a sports marketing public relations consultant, his clients would have to indicate precise details of the segment of the broadcast involving his client. Such details would include the hours, minutes and milliseconds of the appearance of the relevant footage in order to justify sponsorship. In order to provide such details, it was necessary for the public relations consultants to view the footage. More significantly, DW1 maintained that they needed the visual segments as corroborative proof.

[87] DW2 similarly confirmed that the visual segments comprised an important part of her research work in relation to dance performances. If such segments were not available, she confirmed that her research would be delayed considerably and that costs incurred would increase as she would need to find ways of procuring such information and paying for the same. DW4 testified that the media monitoring services provided by the MediaBanc group of companies was extremely useful market intelligence which public relations firms depended on to articulate the news and thereby fulfil their function. He explained in cross-examination, that a report from the defendants comprised an Excel sheet indicating the various news coverage for the day. If the client had a retainer with the defendants, it would get in addition, scanned television news clippings in video form and clippings from the internet which would be emailed with a link. He also confirmed that if a retainer were sought for one event only, then he would receive clippings of all coverage of that event. Usually he was advised if a royalty fee was payable to the media owner and that would be included in the cost of the retainer. He further confirmed that the clippings he received would be forwarded to the end-client. Like DW2 he maintained that if such clippings were not available from the defendants he would be forced to source them independently. He testified that it was not easy to procure such recordings as television stations do not provide that service.

[88] After the defendants' four witnesses had testified, the defendants then closed their case. This then comprises a summary of the evidence adduced by the plaintiffs and the defendants respectively. From this evidence as set out earlier several issues arose for consideration. The issues are set out below again for ease of reference:

Issues

(a) Have the plaintiffs established ownership of copyright in the television and radio news programmes produced and broadcast by them?

(b) Have the defendants infringed the plaintiffs' copyright in the works above, and if so which acts of the defendants constitute infringement?

(c) Is the defence of fair use/fair dealing available to the defendants?

Have the plaintiffs established ownership of copyright in the television and radio news programmes ie the works broadcast by them?

[89] The original works comprising the subject matter in this case are the news programmes on television produced by the plaintiffs, more particularly the first plaintiff ('television news programmes') and the radio programmes produced by the plaintiffs, more particularly the second plaintiff ('radio programmes'). Notwithstanding that the plaintiffs seek protection for all television news programmes and radio programmes, for the purposes of this

trial they produced in evidence four full television news programmes of 30 minutes each, which were annexed to an affidavit in compliance with s 42 of the Copyright Act 1987. The declarant was PW6 and the affidavit was produced in court by PW7. These four compact discs therefore comprised the true copies of four television programmes produced by PW1. The plaintiffs also produced through PW5, ie vide the trap purchases, infringing copies namely exhs P2A, P2B, P2C and P2D. There was therefore before the court a true copy of the four television programmes by way of sample/example of the continuous television programmes produced by the plaintiffs, as well as segments or clips comprising what they claimed were infringing copies. On the basis of the production of these four true copies (exh P–10) and the four infringing copies (exhs P2A–P2D) the plaintiffs seek protection for all television news programmes produced by them. Additionally the plaintiffs also seek in similar manner protection for all radio programmes produced by them.

[90] The question that arises for consideration is whether the plaintiffs have indeed established that they are the owners of copyright in the aforementioned television news and radio programmes.

The relevant provisions of the act required to establish ownership/subsistence of copyright in the news programmes

[91] Under the provisions of the Copyright Act 1987 ('the Act') copyright can be established in a multitude of ways. The plaintiffs' contention is that by establishing that they own the copyright in the four compact discs exhibited as P10, they are then entitled to seek by way of extrapolation a finding of this court that all television news programmes and radio programmes produced by them are equally entitled to such protection under the provisions of the Act.

[92] The television news programmes therefore refer to the television news programmes produced by Channel NewsAsia, as well as news bulletins broadcast on Channel 5, Channel 8, Channel U, Suria and Central. The onus is on the plaintiffs to establish that they are the owners of copyright in all television news programmes broadcast on these channels. As for the radio programmes, they refer to radio broadcasts in four different languages over the airwaves in Singapore, namely Gold 90.5FM, Class 95FM, 98.7FM, 93.8LIVE, Symphony 92.4FM, Lush 99.5FM, Capital 95.8FM, Oli 96.8FM, FM96.3 The International Channel, Radio Singapore International and SmartRadio. Where the television news programmes and radio programmes include content from third parties, the first and second plaintiffs maintain that they have contracted licence agreements with the requisite parties.

What then are the relevant provisions of the Act to establish copyright in the instant case?

[93] Section 7(1) prescribes 'works' eligible for copyright:

> Subject to this section, the following works shall be eligible for copyright:
>
> (a) literary works;
>
> (b) musical works;
>
> (c) artistic works;
>
> (d) films;
>
> (e) sound recordings; and
>
> (f) broadcasts.

[94] In the instant case the plaintiffs seek copyright protection in respect of:

(a) the broadcast of the television news programmes; as well as

(b) film and sound recordings in the pre-recorded segments comprising a part of the television news programmes.

[95] With respect to the radio programmes, the plaintiffs seek copyright protection in respect of:

(a) the broadcast of the radio programmes; and

(b) sound recordings in the radio programmes. We shall consider the establishment of copyright in the television news programmes first, followed by the radio programmes.

The law in relation to establishing copyright entitlement in the television news programmes

[96] Consideration will be given first to the plaintiffs' claim for copyright protection in respect of the broadcasts of the television news programmes followed by their claim to copyright protection in respect of the pre-recorded segments which comprise a part of the news programmes. The pre-recorded segments refer to the segments of the news programmes that are not live and that are recorded before the news programmes are aired and are added to become a part of the entire 30 minutes programme. Turning to the law, by virtue of s 7, the television news programmes fall within the definition of 'works' eligible for copyright as they are broadcasts. Additionally the pre-recorded segments are 'works' eligible for copyright protection as they comprise 'films' and 'sound recordings' as defined above in s 7.

[97] The next relevant section is s 10(1) of the Act which provides that '*Copyright shall subsist in every work eligible for copyright of which the author* or in

the case of a work of joint authorship, any of the authors is, at the time when the work is made, *a qualified person*'. (Emphasis added.)

[98] How are the words 'author' and 'qualified person' defined in the Act? Section 3 of the Act provides that:

> 'author' —
>
> (f) in relation to *broadcasts* transmitted from within any country, means —
>
> (i) the person transmitting the programme, if he has responsibility for the selection of its contents; or
>
> (ii) any person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission; ...

[99] In relation to *films or sound recordings* the 'author' means the person by whom the arrangements for the making of the film or recording were undertaken.

[100] A 'qualified person' is also defined in s 3. It specifies that 'in relation to a body corporate means a body corporate established in Malaysia and constituted or vested with legal personality under the laws of Malaysia' while in relation to an individual it means a person who is a citizen or permanent resident in Malaysia.

[101] In the context of broadcasts, it appears that the Act envisages that copyright may well subsist and be owned by a body corporate, rather than an individual. This is further borne out by the provisions of s 10(2) which stipulate that:

> Copyright shall also subsist in every work which is eligible for copyright and which —
>
> (c) being a broadcast is transmitted from Malaysia.

It follows that a broadcast is more likely to be transmitted by a body corporate rather than an individual.

[102] And 'broadcast' means:

> ... a transmission by wire or wireless means, of visual images, sounds or other information which —
>
> (a) is capable of being lawfully received by members of the public; or
>
> (b) is transmitted for presentation to members of the public;

[103] From the composite application of the foregoing provisions, it follows that broadcasts from Malaysia produced by a body corporate in Malaysia are entitled to copyright protection under the Act. In the instant case however, the plaintiffs are Singaporean, being bodies corporate incorporated in Singapore and transmitting from Singapore.

[104] However s 59A of the Act provides as follows:

> (1) *The Minister may make regulations applying any of the provisions of this Act specified in the regulations, in relation to a country so specified in the regulations* (which in this section is referred to as the 'specified country') which may or may not be a party to a treaty or a member of any Convention or Union relating to copyright or performers' rights to which Malaysia is also a party or a member, *so as to secure that those provisions* —
>
> (a) apply in relation to literary, musical or artistic works, *or films or sound recordings*, or published editions of literary, musical or artistic works first published in that *specified country* as they apply in relation to literary, musical or artistic works, or films or sound recordings, or published editions of literary, musical or artistic works first published in Malaysia;
>
> (c) ...
>
> (d) apply in relation to *broadcasts transmitted from that specified country* as they apply in relation to broadcasts transmitted from Malaysia.

[105] Following upon this the Minister has made regulations allowing for the applicability of the Act to be extended to foreigners, ie individuals or companies incorporated in foreign jurisdictions in the form of the Copyright (Application to Other Countries) Regulations 1990 ('the Regulations'). Broadcasts appear to be governed by reg 4 which stipulates as follows:

> 4
>
> (1) Subject to these Regulations, the provisions of the Act shall apply in relation to —
>
> (a) ...
>
> (b) broadcasts transmitted from a country specified in Schedule 2 as they apply in relation to broadcasts transmitted from Malaysia.

[106] 'A country specified in Schedule 2' is defined as 'All countries that are Members of the World Trade Organisation'. Singapore is a member of the World Trade Organisation. It would therefore appear on a perusal of s 59A,

reg 4(1)(b) and Schedule 2 that broadcasts transmitted from Singapore are entitled to protection under the Act in as much as broadcasts transmitted from Malaysia.

[107] As for the pre-recorded segments comprising a part of, or an inherent part of the television news programmes, reg 3(a) appears to be relevant. It provides as follows:

> 3(a) Subject to these Regulations the provisions of the Act shall apply in relation to literary, musical or artistic works or films first published in the respective specified countries as they apply in relation to literary, musical or artistic works, or films first published in Malaysia.

[108] 'Specified countries' is defined in s 2 to mean 'the countries which are members of the Berne Convention'. Singapore is a signatory to the Berne Convention. Therefore it would follow that films first published in Singapore would enjoy the same copyright protection as films first published in Malaysia.

[109] What about the sound recordings in the pre-recorded film segments in respect of which the plaintiffs seeks copyright protection? As pointed out by learned counsel for the defendants, Mr Thompson, 'film' is defined in s 3 as:

> means any fixation of a sequence of visual images on material of any description, whether translucent or not, so as to be capable by use of that material with or without any assistance of any contrivance —
>
> (a) of being shown as a moving picture; or
>
> (b) of being recorded on other material, whether translucent or not by the use of which it can be so shown,
>
> *and includes the sounds embodied in any soundtrack associated with a film*; ...

[110] It would therefore follow that there is no 'separate' sound recording in the television news programmes. The sound recordings in the pre-recorded segments of film, by virtue of the definition of 'film' above become a part of the film works. As such it would appear that the issue of a separate entitlement to protection for purely 'sound' copyright in the television news programmes does not arise. The plaintiffs can only seek to claim copyright protection in respect of the pre-recorded film segments comprising a part of the television news programmes, whereby the sound recordings inherent therein will be accorded protection as being a part of the pre-recorded segment.

Proof of copyright in relation to the 'broadcasts' of the 'television news programmes'

Establishing copyright through ss 7, 10, 3 and 59A of the Act read together with reg 4(1)(b) of the Regulations

[111] First consideration is given to proof of copyright in relation to *broadcasts of the television news programmes*. From the various definitions set out above, it is evident that the 'author' of a broadcast of the television news programmes would be either the person or corporate entity transmitting the programme if he or it has responsibility for the selection of the contents of those television news programmes, or anyone providing the programme who works together with the person transmitting it. It would therefore follow that the 'author' of a broadcast is the producer of the broadcast. In the context of the television news programmes therefore the author is the producer of those news programmes. For purposes of the television news programmes it is therefore sufficient for the purposes of establishing copyright, for the 'author' of the broadcast, ie the producer to give evidence that it is the entity responsible for the production of the television news programmes.

[112] How did the plaintiffs in the instant case seek to establish copyright in the 'broadcasts' of the television news programmes? The plaintiffs have sought to prove ownership of copyright by establishing that presently it is the fourth plaintiff ie MediaCorp Pte Ltd that owns the copyright in the broadcasts of the television news programmes as such copyright was assigned to it on 1 April 2008 by the first plaintiff.

[113] In order to establish that copyright subsisted in the first plaintiff prior to the assignment to the fourth plaintiff as of 1 April 2008, the plaintiffs relied on PW6 to establish such ownership. PW6, it will be recalled is the Assistant Vice President of Business Development of the fourth plaintiff. PW4 is also the holding company of all the other plaintiffs.

[114] PW6 in his capacity as the representative of the MediaCorp group of companies, ie all the plaintiffs, explained in the course of his evidence, inter alia, that the first plaintiff was the producer of all the television news programmes. He explained that the third plaintiff and MediaCorp TV12 Singapore Pte Ltd had entered into commissioning agreements (which were referred to in court) with the first plaintiff to produce all news bulletins broadcast on Channel 5, Channel 8, Channel U, Suria and Central. The first plaintiff owns and operates Channel NewsAsia. In short all the television news programmes are therefore produced by the first plaintiff.

[115] Further and in any event, it is an agreed fact between the parties that the first plaintiff owns and manages Channel NewsAsia and Channel NewsAsia International and is a producer of news and current affairs programmes in the South East Asian region.

[116] As such at all material times in 2006, the first plaintiff was the producer and therefore the 'author' of the broadcasts of the television news programmes as it was responsible for the transmission of those news programmes. This fact was not challenged by the defendants during the course of cross-examination.

[117] As referred to at the outset, on 1 April 2008, PW6 testified that all of the first plaintiff's copyright ownership in the broadcasts was assigned to the fourth plaintiff wholly. The plaintiffs did not produce the assignment to further evidence this fact. However the fact of assignment was also not challenged in the course of cross-examination by the defendants. In these circumstances it would appear that by virtue of establishing that the first plaintiff was the producer of all the television news programmes and that it subsequently assigned all those rights to the fourth plaintiff, the plaintiffs have established authorship in those news programmes entitling such works, ie the broadcasts of the television news programmes to be eligible for copyright protection under the Act.

Proof of copyright in the broadcasts vide s 42 of the Act

[118] The plaintiffs also sought to comply with s 42 of the Act. The section provides:

(1) An affidavit or statutory declaration made before any person having authority to administer oath by or on behalf of any person claiming to be —

(a) the owner of the copyright in any works eligible for copyright under this Act stating that —

(i) at the time specified herein copyright subsisted in such work;

(ii) he or the person named therein is the owner of the copyright; and

(iii) a copy of the work annexed thereto is the true copy thereof; or

(b) ...

shall be admissible in evidence [in] any proceedings under this Act and shall be prima facie evidence of the facts contained therein.

[119] PW6 affirmed a statutory declaration wherein he asserted that he was making the declaration on behalf of the fourth plaintiff. In para 4 he affirmed that the fourth plaintiff through its employees was the producer of the news programmes which comprised the 'works'. True copies of the 'works' marked as exhs CJY1, CJY2, CJY3 and CJY4 which were stored electronically in four digital video discs were annexed.

[120] Segments comprising approximately two or more minutes from these 30 minutes programmes were copied or recorded by the defendants and were a part of the trap purchases initiated by the plaintiffs. In short exhs P2A–P2D were the infringing copies while the discs annexed to P42 were the true copies.

[121] In accordance with s 42 therefore it follows that PW6 had made a statutory declaration on behalf of the fourth plaintiff which is the owner of the copyright in the television news programmes described as the 'works' and annexed a true copy of those works to exh P10. This, the plaintiffs contended, amounted to establishing prima facie title to copyright in the said four 30 minutes television news programmes. Premised on establishing such prima facie copyright, it was contended that the onus shifted to the defendants to rebut such ownership. Additionally on the basis that ownership in the four thirty minute segments of news programmes had been established, the plaintiffs sought, as stated at the outset, an extrapolation of the court's findings on copyright to be extended to the broadcasts of all television news programmes.

Establishing film copyright in the pre-recorded segments of the television news programmes

Sections 26, 10, 3, 59A of the Act and reg 4(1)(b) of the Regulations

[122] As explained earlier, the pre-recorded segments comprise an inherent part, or composite part of the television news programmes. The plaintiffs sought to establish copyright in these pre-recorded segments by establishing that the authors of these pre-recorded segments were employees of the first plaintiff who had by virtue of s 26(2)(b), made or authored these segments in the course of their work as employees and that therefore the copyright in those film segments belonged to th first plaintiff.

[123] By virtue of the provisions of s 26(1) of the Copyright Act 1987 ('the Act') copyright conferred by s 10 shall vest initially in the 'author'. Section 26(2)(b) provides that where the 'works' were made in the course of employment, ownership is deemed transferred to the employer. In the context of the pre-recorded film segments, this has to refer to the pre-recorded segments contained in the four true copies of the 30 minutes segments

exhibited as CJY1, CJY2, CJY3 and CJY4 in exh P10 (the 'works' cannot refer to exhs P2A–P2D because those are the 'infringing' copies).

[124] In his statutory declaration, P10, PW6 affirmed in para 5, the names of the editors or producers of the four 30 minutes news programmes. He also affirmed that these four editors or producers were employees of the first plaintiff at the time those news programmes were made in 2006. This issue of fact was not challenged in the course of cross-examination.

[125] By virtue of s 26 therefore, as the works were made in the course of the author or producer's employment, it was deemed transferred to the first plaintiff. This brings us to the question of who the 'author' of the pre-recorded film segments is. Section 3 defines the 'author' in relation to films or sound recordings as the person by whom the arrangements for the making of the film or recording were undertaken. Accordingly it would follow that the editors or producers were the persons by whom the arrangements for the making of the film or recordings were undertaken. Therefore as of 2006 the copyright for these 'works' subsisted with the first plaintiff and were assigned to the fourth plaintiff as of 1 April 2008. Thereby film copyright in the pre-recorded segments of the four television news segments appears to be established. The plaintiffs, as is the case with the broadcast copyright, seeks an extrapolation of the finding of this court to extend to all the television news programmes.

Proof of broadcast and sound recording copyright in the radio programmes

[126] The modus of establishing radio copyright would have been essentially the same. It was open to the plaintiffs to establish broadcast copyright in the radio programmes by establishing that the second plaintiff is the 'producer' of all the radio programmes as defined above, and that it assigned all such copyright to the fourth plaintiff as of 1 April 2008.

[127] PW6 did in fact give considerable evidence to this effect in the course of his examination-in-chief. He testified that the second plaintiff 'rightfully' owns the MediaCorp produced content in all the news, information and entertainment radio programmes offered by its stations. However unlike the case of the television news programmes, no copies of any of the 'works', ie recordings of the radio programmes were produced. In the case of the television news programmes it will be recalled PW6 relied on exh P10 in which four true copies of the news programmes were annexed thereby enabling the plaintiffs to establish prima facie evidence of entitlement to copyright in those news programmes. In the case of the radio programmes however, there are no true copies of the broadcast of the radio programmes or a reduction into fixed form of the sound recordings of such radio programmes. In short there is no object or copy which the court can refer to as the 'works' in respect of which broadcast

and sound copyright protection is sought. Neither is there compliance with the provisions of s 42 which require that a 'true copy' of the 'work' in respect of which copyright protection is sought, is annexed.

[128] The plaintiffs meet this objection raised by the defendants by contending that a copy of the radio broadcasts is indeed before this court in the form of exhs P2A, P2B, P2C and P2D. However the radio excerpts or programmes were not played in court, nor referred to. More significantly however, such samples of the radio programmes, even if available in P2A–P2D, comprise a part of the 'infringing' copies as they comprise copies procured from the defendants. Section 42 envisages that a true copy of the works be produced by the plaintiffs to establish prima facie subsistence and ownership of copyright. Accordingly the requirements of that section and the other sections of the Act are not met. In order to establish copyright in the radio programmes it was incumbent upon the plaintiffs to produce a true copy of, at least, some radio programmes, as they did for the television news programmes.

[129] It would be entirely inequitable, in the face of the pleadings in the instant case, where the establishment of copyright is heavily challenged, for this court to hold that the provision of samples of the television news programmes in itself is sufficient to evidence proof of subsistence and ownership of copyright in the radio programmes. Neither is it acceptable, in view of the minimum requirements in s 42 for this court to rely on exhs P2A–P2D. The court ought to have for its reference a true copy in conjunction with the infringing copy to enable a comparison to be undertaken.

[130] In so far as the sound recording in the radio programmes is concerned, it would have been necessary for the plaintiffs in light of the definition of 'sound recording' to produce 'any fixation of a sequence of sounds or of a representation of sounds capable of being perceived aurally and of being reproduced by any means, ...'. No such sound recording of the radio programmes was either played in court or produced.

[131] I therefore conclude that in so far as the radio programmes are concerned, the plaintiffs have failed, by reason of their failure to produce a true copy of the recording of any of the radio programmes, to establish broadcast copyright.

[132] On an examination of the totality of the plaintiffs' evidence therefore, it appears that they have established ownership of broadcast copyright in the four news programmes exhibited in court via P10. Equally they have established film copyright in the pre-recorded segments of the said four news programmes. It appears to this court, as a matter of proof that the production of a sample of four of the fourth plaintiff's complete 30 minutes news

programmes aired on television, does comprise sufficient example/sample of their ownership in such television news programmes. The plaintiffs produce television news programmes continuously on many television channels. It would not be reasonable nor practical to expect them to produce every news programme they produced (not to speak of future productions) in order to enable them to seek protection under the Act. The provisions of the Act appear to my mind to provide protection to, inter alia, countries in the World Trade Organisation as well as those that are signatories to the Berne Convention. Accordingly proof of subsistence and entitlement to copyright should not be made so onerous, nor such a hurdle that lawful persons or corporations, otherwise entitled to assert copyright, are constrained, or face evidential difficulties in proving copyright. Having said that, it is equally clear, as I stated at the outset, that the Act envisages and allows for several different modes of establishing copyright, the simplest being through s 42.

[133] With the application of s 59A of the Act considered in conjunction with reg 4(1)(a) and (b) of the Copyright (Application to Other Countries) Regulations 1990 ('the Regulations') it would appear that the television news programmes broadcast in Singapore enjoy protection as they were first published or broadcasted in Malaysia. In *Honda Giken Kogyo Kabushiki Kaisha v Allied Pacific Motor (M) Sdn Bhd & Anor* [2005] 3 MLJ 30; [2005] 6 CLJ 174, it was held:

> ... With fresh amendments reg 59A was inserted by the Copyright Act 1990 (Act 775), purposefully enacted to enable Malaysia to fulfil its obligation under the Berne Convention, whereupon the result was the promulgation of the Copyright (Applications to Other Countries) Regulations 1990. The latter regulations were to accord copyright protection to works that originated from member state countries. Regulation 3 specifically enacts that ...
>
> Regulation 1(2) provides that all the regulations, and by necessity to include the above reg 3, apply in relation to works made before the commencement of these regulations as they apply in relation to works made thereafter. As I understand it this provision is retroactive as well as prospective in effect.
>
> *The total effect of the two regulations is that any work from a specified country, regardless of time, if eligible for copyright protection under the Copyright Act 1987, will be accorded protection whether it did enjoy protection or not in that specified country*. (Emphasis added.)

The contentions of the defendants as to why copyright is not established

[134] I have in the course of examining the law and the evidence led in this case, covered to some extent, some of the objections raised by the defendants. I shall now proceed to consider the rest of their contentions as to why they

maintain the plaintiffs have not established copyright in the television news programmes and the radio programmes (for completion, notwithstanding that I have concluded that the plaintiffs have not established subsistence and ownership of copyright in the radio programmes).

[135] The defendants pointed to the following deficiencies and discrepancies in the plaintiffs' evidence which they contended precluded the plaintiffs' from asserting copyright as discussed above.

[136] They point out that the plaintiffs only produced the digital video clips marked as exhs P2A, 2B, 2C and 2D through PW5. These were the same clips produced by PW6 in the course of his evidence. No other clips or recordings were adduced or played in court by the plaintiffs. The defendants submit that the failure of the plaintiffs to produce the 'original works' which they claim to have been infringed means that they have not provided the court with any evidence to believe in the existence of the plaintiffs' original work. In essence the defendants maintain that it is incumbent on the plaintiffs to show sufficient objective similarity, a causal connection and 'substantial part' between the original work and the infringing copy. This, the defendants maintain can only be done if the original works and the infringing copies are before the court.

[137] In response to this submission, the plaintiffs sought to reopen their case. Having been allowed to do so, they then tendered a declaration by PW6 under s 42 of the Act, which enclosed the four full news programmes, marked as exhs CJY1, CJY2, CJY3 and CJY4. These four programmes comprised samples of the original television news programmes. As such it would appear that the original works for the broadcast of the plaintiffs' four television news programmes were available in court for purposes of comparison. Therefore the defendants' contention that there were no original works in relation to the television news programmes is not accurate.

[138] The defendants maintain however that the statutory declaration sworn by PW6 was not tendered through him, but through another employee of the plaintiffs, ie PW7. To my mind this in itself does not invalidate the effect of the statutory declaration or its contents. This is particularly so as the defendants made no objection on these grounds to the admission of the declaration during the course of the trial. Neither was there cross-examination on this point when the s 42 declaration was tendered. Given the lack of objection at the time when the declaration was tendered, it appears that these factors do not serve to invalidate the value of P10.

Error in the s 42 statutory declaration

[139] The defendants also point out that the statutory declaration attributes

copyright in the works to 'the Media Shoppe Berhad' which is not one of the plaintiffs in the suit. The plaintiffs however have explained this, stating that the use of that name was a typographical error. Although careless, this appears to be the case, as PW6, the declarant had previously set out the full picture in relation to the subsistence and devolution of copyright from the first and second plaintiffs to the fourth plaintiff.

Contradiction between pleadings and evidence adduced through PW6

[140] Next the defendants point to the fact that in their pleadings, the plaintiffs' limited copyright ownership to the first and second plaintiffs, while at trial it was explained that copyright in both the television news programmes and the radio programmes subsisted in the fourth plaintiff. The defendants' complaint is that no amendments were, made to the pleadings to reflect such change. Again during the course of the trial, there was no cross-examination directed at PW6 on this point. Nor was PW6 challenged on the assignment of copyright to the fourth plaintiff or asked to produce this document in court. Given the lack of objection to PW6's evidence on ownership of copyright, and the lack of cross-examination on this point, it appears that PW6's evidence was accepted in totality on this point. His evidence was that the first plaintiff and the second plaintiff assigned their copyright in the television news programmes and the radio programmes to the fourth plaintiff on 1 April 2008. As such PW6's unchallenged and uncontradicted evidence remains on record in court. It is undisputed evidence of copyright having vested in the fourth plaintiff as of 1 April 2008. Therefore this evidence cannot be ignored and prevails, notwithstanding the seeming contradiction with the pleadings.

Section 42(2) of the Act

[141] The defendants' complaint that the plaintiffs have failed to comply with s 42(2) of the Act which provides that: 'Any person who is authorized to act on behalf of the owner of the copyright for the purposes of subsection (1) shall be required to produce such authorization in writing.' Their specific complaint is that the plaintiffs failed to provide such written authorisation in their statutory declaration which disqualifies the contents from being prima facie proof of the facts contained therein.

[142] It will be recalled that the declaration was made by PW6. Prior to this statutory declaration being tendered, PW6 had given evidence for the better part of a day explaining that he was the Assistant Vice President of Business Development of the fourth plaintiff and specifically authorised to give evidence on its behalf. PW6 stated on oath that he had personal knowledge of the plaintiffs' claim as well as information derived from the documents of the plaintiffs to which he had access. He states in para 12 of P10 that he, on behalf

of the fourth plaintiff, asserts the fourth plaintiff's ownership of copyright in the four television news programmes. It was evident from the tenor and content of his evidence that he was fully authorised to give evidence on behalf of all the plaintiffs, including the fourth plaintiff. His authorisation was not in issue. PW6 was moreover, cross-examined at some length by learned counsel for the defendants. In the course of such cross-examination his authorisation was never questioned nor challenged. As such, the attempt, somewhat belatedly after trial, to impute that PW6 was not authorised to give evidence on behalf of the fourth plaintiff appears to be an afterthought.

[143] Learned counsel for the defendants referred to the case of *Solid Gold Publishers Sdn Bhd v Chan Wee Ho & Ors* [1998] 5 CLJ 735 where Suriyadi Halim Omar J (now JCA) held that s 42(2) is an evidential requirement which is mandatory in nature. His Lordship held in that case that the section meant that a non-production of the authorisation document would not qualify the contents of the relevant affidavit to be prima facie proof of the facts contained therein. In that case the plaintiffs applied ex parte for an Anton Piller order and did not produce the alleged exclusive licence conferred on them by the principal owners. Further their s 42 affidavit claiming eligibility for copyright was submitted by an agent of the plaintiffs. There was no letter authorising the said agent to act for the plaintiffs. The affidavits did not show any authority conferred on them to act on behalf of the other company.

[144] The facts in *Solid Gold* are quite different from the facts at hand in the instant case. Here the plaintiffs, who are all inter-related, being a part of the MediaCorp group claim to be the principal owners of copyright in the television news programmes and the radio programmes. PW6 is a senior employee of the fourth plaintiff and gave evidence on behalf of the entire MediaCorp group at trial. Most significantly, his authorisation was not challenged or questioned at any stage, either during the course of his evidence, or when the statutuory declaration he had made was tendered through PW7. This notwithstanding that he was cross-examined at some length on all other matters in relation to the production of television news programmes and radio programmes by the plaintiffs. In short, it was evident from the cross-examination undertaken that his authority or authorisation to act on behalf of the plaintiffs was not in issue at any stage during the trial.

[145] The instant case is further distinguishable from the *Solid Gold* case in that that was an application for an Anton Piller injunction while the instant case was a full trial. This afforded the defendants every opportunity to challenge PW6. Having accepted his testimony on behalf of the plaintiffs, it appears to be somewhat belatedly raised that PW6 was not authorised to make the statutory declaration on behalf of the plaintiffs. The defendants' stance appears to be an attempt to technically preclude the plaintiffs from establishing

copyright. The mandatory requirements of s 42(2) are imperative where the statutory declaration provides the sole documentary basis on which the court must rely to establish copyright. In the instant case, PW6 had given extensive evidence for the basis of the plaintiffs' claim. It is not a case, like *Solid Gold*, where the plaintiffs are relying solely on the statutory declaration in itself to establish ownership. On the facts of the instant case, the s 42 declaration is significant because the true copies of the 'works' requiring copyright protection are annexed thereto. As for the rest of the statutory declaration, PW6 had given evidence for the better part of a day on these issues. Despite this, no issue was taken as to his capacity or authorisation to speak on behalf of the plaintiffs. Therefore the only logical conclusion to be drawn is that PW6 was indeed authorised to give evidence on behalf of the plaintiffs, including the fourth plaintiff, and to make the statutory declaration on behalf of the fourth plaintiff. As such, the statutory declaration appears to be valid as PW6 was authorised to make it.

No deed of assignment produced in court

[146] The defendants contend that by virtue of s 27(3) of the Act no assignment of copyright shall have effect unless it is in writing. Accordingly television news programmes to the fourth plaintiff ought to have been produced. It is contended that the court is bound to satisfy itself as to the existence of the assignment in writing before it can give effect to the assignment claimed to subsist. It is pertinent again that in the instant case, PW6 was not at any stage challenged as to the fact of the assignment. PW6 gave evidence that the first plaintiff had validly assigned all copyright in the television news programmes to the fourth plaintiff. This portion of his evidence was not challenged. Neither did the defendants seek production of the written assignment. Even when the s 42 statement was produced where PW6 was the declarant, no questions were put to PW7 who tendered the declaration. In the absence of any cross-examination of PW6 on this point and the acceptance of PW6's sworn statement in P10, this court has no option but to conclude that PW6's evidence stands accepted by the defendants, as does the declaration establishing prima facie title to copyright.

Nature of the exhibits annexed to the statutory declaration

[147] The defendants contend that exhs CJY1–CJY4 are recordings of four television news programmes which have been selected by the plaintiffs as examples of true copies of these works. It is not disputed by both parties that these are recordings of the plaintiffs' television news broadcasts. However the defendants maintain that:

(a) none of these exhibits are in respect of the radio programmes; and

(b) these exhibits are also not copies of 'films' as defined under the Act as they are not copies of the pre-recorded segments the plaintiffs created.

[148] With regards to (a), as discussed earlier, it is evident that no true copies of recordings from the plaintiffs' radio programmes have been played or produced to this court which would enable it to compare the infringing copies (P2A–P2D) with true copies. The evidence is deficient to that extent.

[149] With regards to (b), what the defendants are saying is that if the plaintiffs seek copyright film protection in relation to the pre-recorded segments in their television news programmes, then they ought to have produced samples of only the pre-recorded segments before the court.

[150] It appears to this court that the true copies of the four television news programmes which are eligble for broadcast copyright protection, also inherently contain film rights in the pre-recorded segments which are eligible for protection. However the defendants contend that if the plaintiffs' recording of the broadcast is to qualify as a 'film', in terms of chronology of creation the broadcast would have had to come first before the recording. This would have been a physical impossibility, as the defendants could not have recorded the plaintiffs' film of the broadcast before the broadcast was embodied in a material form and made into a film.

[151] Notwithstanding this contention however, in view of the plaintiffs' evidence (not in issue) that their television news programmes contain both pre-recorded segments as well as 'live' segments, it follows that inherent in the broadcast of these television programmes are film rights which arise by reason of the pre-recorded film segments that are amalgamated with other segments to become the composite television news programme. The pre-recorded segments are eligible for film copyright and true copies of the same have been produced by the plaintiffs vide CJY1–CJY4.

[152] As such the plaintiffs have produced evidence of works eligible for broadcast copyright protection and film protection in their television news programmes in the form of the exhs CJY1–CJY4.

Devolution of title

[153] The defendants maintain that there are actual gaps in the devolution of copyright title from the authors (as initial owners) to the plaintiffs. Referring to the statutory declaration, exh P10, they point to the fact that PW6 merely avers to a belief that pursuant to the provisions of the Singapore Copyright Act, the copyright in the said works have been deemed transferred to the first plaintiff 'from the dates of their respective creation to first April 2008'. The

reference to these dates clearly refers to the fact that the works were deemed transferred from the producer or author to the first plaintiff *until* 1 April 2008 when copyright was assigned to the fourth plaintiff. This corroborates the evidence of PW6 who explained at length in the course of examination-in-chief that copyright in the broadcast of the television news programmes initially subsisted in the first plaintiff but was assigned to the fourth plaintiff on 1 April 2008. The basis for subsistence of broadcast copyright in the news programmes has been explained at some length earlier.

[154] The defendants next point to the fact that PW6 stated in his evidence that commissioning agreements were entered into in 2005 and 2006 which show that the first plaintiff was acting pursuant to a commission by the third plaintiff. As such it is contended that by reason of the existence of such commission agreements that copyright would have been transferred to the third plaintiff rather than subsisting in the first plaintiff. Further the defendants contend that if copyright indeed subsisted in the third plaintiff, then the first plaintiff could not have assigned such copyright to the fourth plaintiff as of 1 April 2008, thereby throwing considerable doubt on the contention that copyright now vests in the fourth plaintiff.

[155] A perusal of PW6's evidence during examination-in-chief and in the course of his statutory declaration clearly stipulate that at all times before 1 April 2008, copyright broadcast in the four television news programmes produced subsisted in the first plaintiff. PW6 did not assert, in the course of his evidence that copyright subsisted or vested in the third plaintiff. This proposition was not put to him. The defendants did not cross-examine PW6 on this point, nor challenge the assertion that copyright subsisted in the first plaintiff. The failure to cross-examine the defendants on what they now contend is an important issue precludes them from making this submission at this stage. At no time was it put to PW6 that contrary to what he was saying, copyright actually subsisted in the third plaintiff. In fact the subsistence of copyright in the fourth plaintiff was not directly challenged by the defendants in the course of the trial. Accordingly this submission is without merit.

Omission of the name of the owner of the copyright

[156] The defendants complain that in exh P10, PW6 failed to mention who the claimed owner of copyright is, in breach of s 42(1)(a)(ii) of the Act. It is further submitted that there are several candidates who could be the owner of copyright resulting in clear ambiguity in the s 42 declaration contained in exh P10.

[157] A perusal of P10 discloses that:

(a) PW6 makes specific reference to four 'works' being four 30 minutes television news programmes.

(b) PW6 explains that the producers or authors of those four 'works' are one Bhagman Singh, Cheryl Lim, Hwee Goh and Cheryl Lim. At all material times these four producers were employees of the first plaintiff. As a consequence by virtue of s 26, the copyright in the said works were deemed transferred from the individual producers or authors to their employer, the first plaintiff.

(c) As of 1 April 2008, PW6 affirmed that the copyright was assigned from the first to the fourth plaintiff.

(d) Again in para 10, PW6 deposes to the fact that by virtue of the provisions of the Singapore Copyright Act, the copyright in those four specific news programmes were deemed transferred to the first plaintiff as and when they were created. This remained so until 1 April 2008 when the copyright was assigned to the fourth plaintiff.

[158] As such it is apparent from the contents of the statutory declaration that PW6, the declarant has clearly deposed to the chain of creation and subsistence of copyright as well as devolution of such copyright to the fourth plaintiff as of 1 April 2008. It is therefore inaccurate, on the basis of P10 to contend that there has been an omission to stipulate the name of the owner of copyright.

Does 'illegality' impact on the subsistence and/or enforcement of copyright?

[159] It is the submission of the defendants that in analysing whether the plaintiffs are entitled to enforce broadcast copyright, consideration must be given to the fact that broadcasting must necessarily be done by a broadcasting service. Accordingly it is contended that not only must the work satisfy the definition of 'broadcast' in s 3, but also of 'broadcasting service', before it can be said that the work belongs to the relevant category of protected works. And in the event the broadcaster does not satisfy the definition of 'broadcasting service' then the requirements for copyright to subsist in Malaysia are not made out. 'Broadcast' is defined in s 3 as follows:

> ... a transmission, by wire or wireless means, of visual images, sounds or other information which —
>
> (a) is capable of being lawfully received by members of the public; or
>
> (b) is transmitted for presentation to members of the public and includes the transmission of encrypted signals where the means for decrypting are provided to he public by the broadcasting service or with its consent.

[160] Broadcasting service is defined as 'any service of radio or television broadcast, operated under the general direction and control of or under licence by the Government, in any part of Malaysia'.

[161] As such it is contended that ambiguity arises in trying to apply the provisions of the Copyright (Applications to Other Countries) Regulations because:

(a) Regulation 4(1)(e) provides that 'the provisions of the Act shall apply in relation to persons who, at the material time, are citizens of, or residents in, a country specified in Schedule 2, as they apply in relation to persons who, at such a time, are citizens or permanent residents in Malaysia'. The defendants contend that this means that while the 'author' or producer of the broadcast could be a foreigner, this does not impinge upon the requirement that the broadcasting service has to be operated under the general direction and control of or under licence by the government, in any part of Malaysia. In short it is contended that in order to be entitled to broadcast copyright a foreign entity falling within Schedule 2 would still have to have a licence to broadcast in Malaysia, failing which the Regulations would not apply.

[162] In response to this the plaintiffs point to s 59A(1)(d) and reg 4(1)(b) of the Regulations which clearly stipulate that all countries who are members of the World Trade Organisation enjoy broadcasting rights in Malaysia which are capable of protection under the Act in the same manner as Malaysian broadcasters are protected in Malaysia.

[163] Having considered these competing contentions, it falls upon the court to construe the relevant provisions of the Act and the Regulations to ascertain the intent of Parliament in promulgating the same. Section 59A(1)(d) clearly envisages that the Minister is empowered to make regulations applying any of the provisions of the Act in relation to a specified country so as to secure that the provisions of the Act apply equally to that country so as to afford it different forms of copyright protection in Malaysia. Vis-a-vis broadcasts, s 59A(1)(d) expressly provides that the Minister may make regulations which apply in relation to broadcasts transmitted *from that specified country* as they apply in relation to broadcasts transmitted *from Malaysia*.

[164] Such an express provision clearly denotes that the section allows and enables the Minister to afford protection to broadcasts transmitted from 'a specified country' as if those broadcasts were transmitted from Malaysia. It does not in any manner limit such protection to broadcasts from a 'specified country' where that foreign corporation or citizen enjoys or holds a Malaysian licence entitling it to broadcast.

[165] Further the words in s 59A(1)(d) clearly envisage that the protection is afforded in relation to broadcasts from that specified country, Singapore in the instant case. If the construction urged by the defendant were to be adopted by this court, this would result in no broadcasts from any of the specified countries enjoying any form of copyright protection under the Act, save and unless those particular foreign entities, albeit corporations or citizens possessed a licence from the Malaysian Government. Such a construction appears to be contrary to the express words and purpose of s 59A(1)(d) and reg 4(1)(b).

[166] In any event the definition of a 'broadcasting service' appears to refer to any service of a radio or television broadcast, operated under licence by the government *in any part of Malaysia*. The existence of the words 'in any part of Malaysia' appear to qualify that this is a reference to broadcasting services in Malaysia. The plaintiffs' broadcasting service is in Singapore, although its broadcasts may be viewed and heard in Malaysia by reason of the transmission of its visual images and sounds. It appears that the definition of a 'broadcasting service' is therefore not directly applicable nor relevant when construing and applying s 59A(1)(d) and reg 4(1)(b).

[167] A purposive construction ought to be given to the said section which seeks to confer protection under the Act reciprocally to specified countries, namely those that are part of the World Trade Organisation. To deny such a specified country protection under the Act would be akin to divesting s 59A and reg 4(1)(b) of its conferment of reciprocity. This would detract from the express words and purpose of those sections because the words used are simple and direct. The words used provide simply that broadcasts transmitted from those countries are entitled to protection equal to that of Malaysian broadcasts under the Act. The defendants appear to be reading into reg 4(1)(b) the additional mandatory requirement that the plaintiffs are required to be licensed in Malaysia in order to enjoy protection under the Act. There appears to be no reasonable basis for imposing such a severe mandatory requirement into s 59A(1)(d) and reg 4(1)(b) when there are no express words to that effect.

[168] The defendants also make reference to a footnote in Professor Khaw Lake Tee's comprehensive and learned treatise, *Copyright Law in Malaysia*, (3rd Ed), published by LexisNexis, where Professor Khaw states:

> It should be noted that 'broadcasts' are not within the scope of the Berne Convention. However, Malaysia extended copyright protection in broadcasts to the United Kingdom in 1994 and subsequently all WTO member countries in 2000 ... This means that notwithstanding the recognition of foreign authorship with respect to broadcasts, not all broadcasts transmitted from abroad enjoy copyright in this country unless they come within the terms of s 10 of the Copyright Act 1987.

[169] As discussed earlier, the plaintiffs' broadcasts in relation to their television news programmes fall within the purview of s 10 in that they are eligible for copyright protection under the Act. Being Singaporean, they are eligible for copyright protection by virtue of the reciprocity and conferment of protection provision in s 59A and the Regulations. It is not the case that foreign broadcasts from specified corporations which otherwise fall within the definition of s 10 of the Act, save for the fact of being non-Malaysian, do not qualify for protection simply because they are foreign. As stated above, this would completely deprive s 59A of its express purpose. Accordingly I am unable to agree with the contention of the defendants that in order to enjoy protection under the Act, the plaintiffs must be armed with, or possessed of a licence from the Malaysian Government licensing them to broadcast in Malaysia.

Is there a breach of the Communications and Multimedia Act 1998 ('CMA') which either vitiates the subsistence of copyright or precludes enforcement of the plaintiffs' claim?

[170] The defendants contends that the plaintiffs have breached the CMA and as a consequence the subsistence of copyright is vitiated. Alternatively the court ought to deny the plaintiffs protection and not enforce their claim.

[171] ln support of this contention the defendants contend that the Berne Convention does not provide for copyright in broadcasts. It is instead the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations ('the Rome Convention') which provided for copyright in broadcasts. Neither Malaysia nor Singapore is a signatory to the Rome Convention.

[172] This contention does not encroach upon the express provisions of s 59A(1)(d) or reg 4(1)(b). It is not open to this court to ignore those provisions which clearly stipulate that copyright protection is conferred upon broadcasts transmitted by any country which is a member of the World Trade Organisation, as any such Malaysian broadcast would be entitled to under the Act.

[173] Secondly the defendants contend that there are anomalies in the Regulations. Such regulations it is contended were initially promulgated to give effect to Malaysia's obligations under the Berne Convention in reg 2. Subsequently the defendants contend, through amendments in 1994 and 2000, the Regulations have been used as a vehicle to extend protection for sound recordings and broadcasts through what they term 'minor' amendments to the schedules even if those rights are not under the Berne Convention and

even though the main regulation itself has not been suitably amended to indicate the other treaties or conventions that the regulation appears to be serving.

[174] In essence the complaint of the defendants pertains to the drafting of the Regulations. This is, for the purposes of the instant case, to be contrasted with the construction and purpose of the Regulations. As they currently read, s 59A(1)(d) and reg 4(1)(b) clearly and expressly provide for broadcast copyright protection under the Act to be conferred on specified countries. The so-called 'deficiencies' in the drafting, if they do exist, do not detract from the clear and simple meaning to be accorded, namely reciprocity of protection in keeping with the fundamental premise behind international intellectual property treaties, namely the concept of national or equal treatment, whereby a foreigner enjoys exactly the same treatment accorded to a country's own nationals.

[175] Thirdly the defendants press home the point that it is in the interests of the Malaysian Government and all other governments to control what is broadcast in their own countries. There is, it is contended far greater importance in the content of a broadcast as opposed to that in a literary, artistic or musical work which attracts copyright. PW6 in the course of his evidence confirmed that the plaintiffs conformed to all censorship and licensing requirements in Singapore but that he was unaware of any such efforts being made with regards to Malaysian advertising codes, content codes or censorship guidelines. As such the defendants put this forward as one more reason why broadcast copyright protection ought not be granted to the plaintiffs. It is necessary, they maintain, that in order to enjoy such protection the foreign broadcaster must have complied specifically with Malaysian licensing and censorship guidelines.

[176] Again such a contention would run awry of the express provisions of s 59A(1)(d) as well as reg 4(1)(b). If requirements such as licensing and adherence to Malaysian codes were mandatory, there would have been express provision or qualification to this effect in the Regulations or in the Act. There are no such qualifications or provisos. In the absence of any such qualifications it would, as I have said previously, seriously detract from and distort the very purpose of those sections if reciprocity and protection were disallowed on these grounds. Such a construction would be irrational and fail to meet or adhere to the purpose for which those Regulations were promulgated. This contention of the defendants is therefore also dismissed.

Are the plaintiffs' broadcasts tainted with illegality precluding them from being claiming protection under the Act?

[177] Essentially the defendants contend that as the plaintiffs have

contravened the provisions of the CMA by failing to be in possession of the relevant licence to broadcast in Malaysia, their broadcasts are tainted with illegality, thereby precluding them from enjoying protection under the Act. This contention is premised on the basis that there has in fact been a contravention of the CMA and other like provisions governing the broadcast of materials in or from Malaysia. As discussed above, the plaintiffs have complied with the licensing laws in their own country and seek reciprocal broadcast protection by virtue of the express provisions of the Act, ie s 59A (1)(d) coupled with reg 4(1)(b). As the plaintiffs are broadcasting from Singapore, there is no requirement that they must be licensed in Malaysia. The provisions of the CMA as well as the definition of a 'broadcasting service' envisage broadcasts conducted from or in Malaysia. As such, it does not irreversibly follow that the plaintiffs have acted illegally or committed an offence under the CMA simply because their broadcasts, which emanate from Singapore, can be picked up in Malaysia. Section 4 of the CMA states as follows:

(1) This Act and its subsidiary legislation apply both within and outside Malaysia.

(2) *Notwithstanding subsection (1)*, this Act and its subsidiary legislation shall apply to any person beyond the geographical limits of Malaysia and her territorial waters *if such person* —

(a) is a licensee under this Act; or

(b) provides relevant facilities or services under this Act *in a place within Malaysia*.

(c) ...

(d) ...

[178] Pursuant to the above section the CMA is applicable to a person who provides relevant facilities or services under the CMA in or from a place within Malaysia.

[179] 'A place' is defined in s 4(3) of the CMA as the air space above the territorial jurisdiction of the land of Malaysia or the waters off the shores of Malaysia that are considered Malaysian waters.

[180] Therefore in my view, in relation to a broadcaster, the CMA ought only apply to a person or entity who provides the source of the broadcast ie the equipment required for broadcasting services within the air space above the territorial jurisdiction, the air space above the waters of the shores of Malaysia that are considered Malaysian waters, and from within the territorial jurisdiction of the land and waters of Malaysia.

[181] The plaintiffs do not fall within the definition above as the source of the plaintiffs' broadcasts is Singapore. It is not in dispute that the broadcasts of the television news programmes are broadcast out of Singapore and that the first and second plaintiffs are licensed broadcasters in Singapore. As such the plaintiffs are not a network service provider in Malaysia with which the CMA is concerned. As such the contention of a contravention of the CMA does not come into play as it is inapplicable to the plaintiffs.

[182] I have concluded prior to this that the plaintiffs are not in contravention of the CMA and other licensing and censorship codes and requirements for the same reason, namely that the plaintiffs are not broadcasting from or in Malaysia but from or in Singapore. However their broadcasts are, entirely involuntarily, caught in parts of Malaysia. The plaintiffs are not therefore a 'broadcasting service' in Malaysia. As such, on the facts of this case, they are not in contravention of the CMA and other like legislation or regulations. Their entitlement to protection is entirely statutory and arises from the express provisions of the Act and the Regulations.

[183] It cannot be said that there has been a blatant or flagrant contravention of the CMA, primarily because the plaintiffs' broadcasts do not emanate from Malaysia. The plaintiffs' broadcasts emanate from a reciprocating country, ie a member of the World Trade Organisation, thereby affording it express protection under the provisions of the Act in Malaysia. The situation could not be more different. Accordingly that line of reasoning, namely that an illegality taints the plaintiffs' entitlement to copyright broadcast is flawed. There is no illegality in the instant case which would have any such effect. Even if I am wrong in concluding that the plaintiffs are not in contravention of the provisions of the CMA, it follows that any such illegality as is occasioned does not taint the plaintiffs' broadcasts to the extent of depriving the plaintiffs of copyright protection under the express provisions of the Act. Authority for this proposition is to be found in the Federal Court decision of *Asia Television Ltd & Anor v Viwa Video Sdn Bhd & Connected Cases* [1984] 2 MLJ 304. In that case, in order for distributors of Hong Kong originating Chinese serials to qualify for copyright protection, they had to 'publish' ie sell or distribute the video to the public within 30 days of the first publication in Hong Kong. However in most cases, it was not possible to obtain approval certificates from the censorship board within the 30 days period. Accordingly there was a contravention of the Films (Censorship) Act 1952. The issue for consideration was whether the distributors could claim protection under the Copyright Act in view of the contravention of the provisions of the Films (Censorship) Act 1952. The Federal Court considered this issue and held as follows:

> ... We would pause to observe in view of the 30 days period provided for in s 2(2)(c) of the Copyright Act, that if the provisions of the Films (Censorship) Act with regard to the necessary certificates are an essential prerequisite to the acquisition of

copyright then it may well be unlikely that in the vast majority of cases any copyright can accrue under the provisions of s 6(1)(a) of the Copyright Act, as the vitiating effect of any delay on the part of the Board of Film Censors would rebound on the heads of innocent claimants of copyright under the Copyright Act.

On a careful evaluation of the relevant and requisite statutory provisions and a consideration of the question of any interplay between them we can find no sufficient nexus as would satisfy the test laid down in Curragh Investments Ltd v Cook [1974] 3 All ER 658. There is no prohibition in either of the Acts which would preclude the appellants from acquiring copyright if they are otherwise qualified although they may be in breach of the provisions of the Films (Censorship) Act which is concerned only with criminal liability and provides a penalty for breach of its relevant provisions. If it were otherwise so as to result in the defeasance of the appellants' rights under the Copyright Act in this case, then it would be equally logical to deprive a person of his rights under that Act if he commits an offence of strict or vicarious liability, such as for instance an offence under the excise laws, without any intention or mens rea.

In the light of the matters we have adumbrated we accordingly find that non-compliance with the provisions of the Films (Censorship) Act does not affect the acquisition of copyright under the Copyright Act. Any infringement of the provisions of the former Act attracts the criminal penalty provided for therein, but if this were also to result in defeating the appellants' rights under the Copyright Act the implications in the matter of economic loss would far exceed the penalty imposable for contravening the censorship requirements of the earlier Act. As we have pointed out there is no express or implied prohibition linking the respective requirements of the two statutes and accordingly no nexus to justify reading them conjunctively and importing the requirements of one as a condition precedent to the operation of the other. (Emphasis added.)

[184] Applying the foregoing reasoning to the instant case, even if the plaintiffs are in breach of the provisions of the CMA, this in itself would be insufficient to deprive them of broadcast copyright protection under the Act, but would, at most, attract the penalties provided for under the CMA itself. In other words, the illegality would not broadly taint the broadcasts precluding them from enjoying copyright protection. The rationale for this is clear. The plaintiffs here are eligible for copyright protection under the Act. They are not broadcasting from Malaysia. Even if there is a contravention of the CMA, the plaintiffs are entirely without mens rea in 'committing' any such illegality. The non-compliance with the provisions of the CMA does not therefore act to deprive or divest the plaintiffs of their entitlement to broadcast copyright protection.

Did the defendants' acts constitute infringement?

[185] In the course of setting out the evidence adduced by both the plaintiffs and the defendants, it was apparent from the evidence of the plaintiffs' witnesses as well as DW3 that in January 2006 the plaintiffs discovered that the defendants were recording, copying, storing and then editing, compiling,

selling and distributing the plaintiffs' television news programmes in the course of providing their media monitoring services. DW3 himself explained that in order to ensure that the data that was compiled from all media sources was accurate, broadcasts, including that of the plaintiffs' are recorded and replayed to verify the accuracy of the data being collected, prior to it being archived. It is therefore not in issue that the defendants do record and store, albeit they maintain for a limited time, the plaintiffs' broadcasts of their television news programmes. Additionally the defendants also edit and compile short but complete segments of the television news programmes in the form of DVDs or CDs which are attached to their media monitoring reports for an additional fee. Section 15 of the Act provides that 'copyright in a broadcast shall be the exclusive right to control in Malaysia the recording, the reproduction, and the rebroadcasting, of the whole or a substantial part of the broadcast, and the performance, showing or playing to the public in a place where an admission fee is charged of the whole or a substantial part of a television broadcast either in its original form or in any way recognizably derived from the original'.

[186] Subsection (2) provides that 'Notwithstanding subsection s 13(1), paras s 13(2)(a), (g), (gg), (ggg), (gggg), (h) and (o) shall also apply to the copyright in a broadcast'.

[187] And sub-s (3) provides that 'the copyright in a television broadcast includes the right to control the taking of still photographs from such broadcasts'.

[188] It therefore follows that as the plaintiffs enjoy broadcast copyright protection under the Act, the defendants are not at liberty to record, reproduce a substantial part of the broadcast either in its original form or in any way recognisably derived from the original, unless they have the express permission or a licence from the plaintiffs. It is not in dispute that they possess no such licence or sanction.

[189] Subsection (2) however qualifies the right of control stipulated in sub-s (1) and specifies circumstances which are exempt or excluded from such copyright control. For example, s 13(2)(a) provides that the right of control vis-a-vis copyright in a broadcast does not include the right to control the recording or reproduction of such broadcasts which are by way of 'fair dealing for the purposes of non-profit research, private study, criticism, review or the reporting of current events, subject to the condition that if such use is public, it is accompanied by an acknowledgement of the title of the work and its authorship, except where the work is in connection with the doing of any of such acts for the purposes of non-profit research, private study and the reporting of current events by means of a sound recording, film or broadcast; ...'

[190] The other subsections of s 13(2) similarly detail the specific circumstances and situations which are exempt from copyright control as particularised in s 15 of the Act. These provisions now fall to be applied in relation to the present factual matrix.

[191] From the evidence of the plaintiffs' witnesses and DW3 it is apparent that the acts of the defendants in, inter alia:

(a) Recording all the television news programmes broadcast by the plaintiffs.

(b) Reproducing a 'substantial' part of those broadcasts, ie entire segments of the television news programmes or news clips in the form of DVDs or compact discs, such that these segments are recognisable in their original form or as having been derived from the original amount to an infringement of the plaintiffs' copyright in those broadcasts. As explained earlier, the plaintiffs have produced four such television news programmes by way of example, and seek protection in respect of all television news programmes on the same basis.

[192] Such infringement is further borne out by:

(a) The evidence of PW3 who testified that in June 2006 she received an email from the TMC Educational Group Pte Ltd to the effect that they had been approached by one 'MediaBanc Singapore' in reality the first defendant who offered for sale clips of a television broadcast on the TMC group which had been aired on the plaintiffs' television channels. This evidences the fact that the defendants record, store and sell a substantial part of the plaintiffs' television programmes in original form or a form close to the original without a licence to do so. The offer was made for a stipulated price;

(b) PW1 gave evidence that in July 2006 she received an email which she forwarded to her superior. In that email Victoria School stated that they had been approached by 'MediaBanc Singapore' ie the first defendant, which offered for sale clips of television broadcast coverage on the school which was aired on the plaintiffs' television channels. Although this email comprises hearsay evidence, as the Victoria School did not attend to give evidence of this fact, such evidence was not challenged in substance in the course of cross-examination, leading to the conclusion that it is in substance, true. Again it amounts to evidence of the defendants having recorded and reproduced substantial portions of the plaintiffs' broadcasts in original form or close to it;

(c) The two trap purchases conducted against the defendants in September and October 2006 by private investigators hired by the

plaintiffs provide clear evidence of the fact that the defendants recorded, copied wholly, stored/archived, edited and reproduced substantial segments of the plaintiffs' broadcasts over various dates. The copies purchased by the plaintiffs comprise clear evidence of this fact as borne out by exhs P2A, P2B, P2C and P2D. Further the defendants charged a fee for the service of retrieving those particular segments and providing copies of the same;

(d) PW4 gave evidence that in January 2007 an entity known as Adam Khoo Learning Technologies had been approached by an employee of the defendants offering for sale a sound clip of a news story which featured an interview with one of the institution's teachers. The sale price of the news clip offered was S$65;

(e) PW2 gave evidence that in April 2007 she received an email from the Ministry of National Development of Singapore ('MNDS') advising that MNDS was approached by the defendants and was offered for sale television broadcast news clips which had been aired on several of the plaintiffs' television channels earlier on that month. Again items (d); and

(f) Provide clear evidence that the defendants have in their possession copies of broadcasts recorded from the plaintiffs' television news channels. It follows therefore that the defendants had recorded, copied, compiled and stored copies of such broadcasts for use in terms of sale to the public.

[193] It is evident from the foregoing, and particularly the evidence of DW3 (which has been outlined in detail earlier on in the judgment) that the plaintiffs continuously record, copy, compile, archive, edit and sell copies of a substantial part of the plaintiffs' broadcasts to the public in a form which is recognisably derived from the original. DW3 admits recording and copying the plaintiffs' television news programmes in their entirety (as well as their radio programmes) as well as selling and distributing segments and clippings to their clients. This is further evidenced by para 12(a) of the agreed facts apart from DW3's evidence. The defendants' acts of copying the news programmes in totality for the purposes of compiling, storing, editing and selling or reproducing segments for sale is an act that infringes the plaintiffs' broadcast copyright as well as their film copyright in the pre-recorded segments of those broadcasts.

[194] However it must be borne in mind that sub-s (2) of s 15 exempts such reproduction and use of such broadcasted copies in certain specific circumstances as outlined in that section and detailed above. The defendants maintain in this context that their use of the copies of the broadcasts of the plaintiffs' television news programmes falls within the definition of 'fair

dealing' within the context of s 13(2)(a) of the Act. It now falls to be considered whether the defendants can rely on this defence of fair dealing in response to the plaintiffs' claim of an infringement of copyright which has been established in relation to the broadcasts of its television news programmes.

The defence of fair use/fair dealing

[195] In his comprehensive submissions, learned counsel for the defendant, Mr Benjamin Thompson submits that the court is bound to appreciate that unlike trademarks, patents and industrial designs which provide true monopolies to the registrant, copyright merely gives the owner a right not to be copied and for the copier not to derive the benefit due to the owner if used for competing purposes. The reason why copyright law is not a monopoly is because inherent in the law is the need for a balance between the copyright owner's right to protect his economic benefit, and the need for society to progress in the development of its creativity and ideas without undue restriction. As stated by Lord Mansfield in *Sayre v Moore* (1785) 102 ER 139n:

> We must take care to guard against two extremes equally prejudicial:
>
> > The one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour;
> >
> > The other, that the word may not be deprived of improvements, nor the progress of the arts be retarded.

[196] In order to achieve this balance between the copyright owner and the public interest of society at large the law has made provision in the form of s 13 of the Act where the five exclusive rights of the copyright owner granted under the Act are qualified by twenty exceptions where the copyright owner has no such right of control.

[197] As set out above, the general head of fair dealing under the Act is in s 13(2)(a) which is reproduced above. The defendants contend that if the foregoing defence under s 13(2)(a) is made out and the defendants' use is deemed to be use for either one or more purposes of non-profit research, private study, criticism, review or the reporting of current events, the plaintiffs will not be able to assert control over the acts of the defendants and the defendants would not need the consent, permission or licence of the plaintiffs to use the copyright works.

How do the defendants' actions give rise to the defence of 'fair use/fair dealing' under the Act?

[198] DW3 gave evidence that there are two broad aspects to the defendants' business:

(a) data processing and statistical analysis; and

(b) providing outsourcing services for the monitoring of the media.

[199] The defendants provide their services in the following manner:

(a) Clients are provided with excerpts of the audio or video recordings at the request, sufficient in length to convey the information as to the context in which their company or brand was mentioned.

(b) The source of the excerpt is acknowledged as required in order to qualify for fair use. This is achieved by adding to the excerpt an extract from the beginning of the programme and another extract from the end of the programme.

(c) The watermark or other identifier of the television station broadcasting the programme is in no way obliterated or distorted.

(d) The excerpt is digitally compressed before being provided to the clients to ensure that the quality of the excerpt is reduced and rendered unsuitable to be used for rebroadcasting or recording.

(e) The defendants maintain that they charge their clients only in respect of the costs of compilation, editing and delivery, but not for the excerpt per se.

(f) The defendants do not sell or offer for sale copies of entire news programmes. They only provide clips or extracts relating to the particular item of news of interest or benefit to the client.

[200] In these circumstances, the defendants maintain that as they conduct a media monitoring business as opposed to a broadcasting business, their recording and compilation of the plaintiffs' television news programmes amounts to fair dealing within the purview of s 13(2)(a).

[201] The plaintiffs on the other hand argue that the act of recording the entire news programmes off air, even if permitted under normal circumstances, becomes an unlawful and infringing act if the purpose for which the recording is done is, in itself, an infringement of the plaintiffs' rights. They point to the fact that the purpose of the defendants recording the television news programmes is, inter alia, to edit and compress and provide copies of the video clips or sound bytes as comprising an integral part of the media monitoring report provided by them. Such an act, they maintain clearly infringes the exclusive rights of the plaintiff as stated in s 15 which clearly provides that only the plaintiffs enjoy the rights of reproduction of the whole or a substantial part of the broadcast in any material form, communication to the public and

distribution of copies to the public by sale.

The law in relation to fair dealing

[202] Section 13(2)(a) precludes the copyright owner from asserting control vis-a-vis his rights where the reproduction, communication, distribution or sale to the public of the copyrighted work is by way of 'fair dealing for the purposes of non-profit research, private study, criticism, review or the reporting of current events ...' (the section goes on to specify the need for acknowledgement of title of the work where the 'fair' use is public, save when such use is for the purposes of non-profit research, private study and the reporting of current events vide sound recording, film or broadcast).

[203] In other words where the use of the copyrighted work is for the purpose of non-profit research, private study, criticism, review or the reporting of current events, such use is exempt from copyright control under the Act. The section is drafted so as to specify with particularity the only circumstances or occasions of use which would qualify for exemption, namely non-profit research, private study, criticism, review or the reporting of current events. The section does not provide for a broad and unspecified category of acts of 'fair dealing' or use, of which the circumstances of non-profit research, private study, criticism, review or the reporting of current events provide some specific examples. This is evident from the fact that the words 'fair dealing' are immediately qualified by the words 'for the purposes of' and followed by the specific events or circumstances in which copyright control is precluded.

[204] As stated by Professor Khaw Lake Tee in her erudite treatise *Copyright Law in Malaysia*, (3rd Ed), LexisNexis:

> In *Beloff v Pressdram Ltd and another* [1973] 1 All ER 241, Ungoed Thomas J referred to the defence of fair dealing in s 6 of the former Copyright Act 1956 and said that such use or dealing must be:
>
> > ... directed to and consequently limited to and be judged in relation to the approved purposes. It is dealing which is fair for the approved purposes and not dealing which might be fair for some other purpose or fair in general.

[205] The learned author also made reference to the case of *Pro Sieben Media AG v Carlton Television Ltd* [1998] FSR 43 where Laddie J stated that the fair dealing provisions of the UK Copyright, Designs and Patents Act 1988 '... are not to be regarded as mere examples of a general wide discretion vested in the courts to refuse to enforce copyright where they believe such refusal to be fair and reasonable'.

[206] It is therefore clear that under the Act fair dealing is qualified by the purpose for which such dealing is done, namely non-profit research, private study, criticism, review or the reporting of current events. As such the next issue for consideration is which of the categories the defendants rely upon to establish 'fair dealing'. From the thrust of the defendants' submissions they seem to contend that their dealing with the plaintiffs' television news programmes falls within the purview of non-profit research, or review or the reporting of current events. In other words, the defendants appear to contend that their acts amount to fair dealing for the purpose of non-profit research and/or fair dealing for the purpose of review or fair dealing for the purpose of reporting current events. Therefore the definition or meaning of each of these categories of 'fair dealing' falls to be considered.

[207] Before considering those specific purposes however it is also necessary to comprehend the phrase 'fair dealing'. It is not defined under the Act. Unlike other jurisdictions, for example Singapore and Australia, the factors to be taken into consideration in determining whether a dealing amounts to a 'fair' dealing have not been set out in the Act.

[208] In the oft-quoted case of *Hubbard and another v Vosper and another* [1972] 1 All ER 1023 at p 1027 Lord Denning MR said:

> It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose that may be unfair. Next you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.

[209] Again in the *Beloff v Pressdram Ltd and another* [1973] 1 All ER 241 Ungoed-Thomas J said with regards to fair dealing:

> ... fair dealing is a question of fact and of impression, to which factors that are relevant include the extent of the quotation and its proportion to comment (which may be justifiable although the quotation is of the whole work); whether the work is unpublished; and the extent to which the work has been circularised, although not published to the public within the meaning of the Copyright Act 1956.

[210] In *Sillitoe v McGraw-Hill Book Company (UK) Ltd* [1983] 9 FSR 545 the court adopted Lord Denning MR's judgment in *Hubbard and another v Vosper and another* and concluded that fair dealing is a matter of impression.

[211] Unlike the provisions of the copyright statutes in the United Kingdom at that time and the current position in Malaysia in relation to fair dealing as set out in s 13(2)(a), which prescribes a fairly narrow exception to the prohibition against the infringement of copyright, the position in the United States is somewhat different. In that jurisdiction four factors are statutorily provided, the application of which will enable a determination of whether a use is fair. These four factors are the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes, the nature of the copyrighted work, the amount and substantiality of the portion used and the effect of the use upon the potential market for or value of the copyrighted work. The various purposes set out there, namely criticism, comment, news reporting, teaching scholarship or research are referred to as examples of fair use but do not serve to provide the defining limits for 'fair dealing', unlike the position under the Act in Malaysia. To that extent the definition of 'fair dealing' in that jurisdiction is considerably wider than in Malaysia under the Act.

[212] In a decision of the United States Court of Appeals for the Ninth Circuit, *Kelly v Arriba Soft Corporation* 336 F 3d 811 the court deliberated on the defence of 'fair use' in a situation where the defendant had reduced images of the plaintiff's art into low resolution 'thumbnail' images. The court found that although the defendant made exact replicates of the plaintiff's images, the thumbnails were much smaller, lower resolution images that served an entirely different function than the original images. While the plaintiff's images served an aesthetic purpose the defendant's search engine provider thumbnails were unrelated to any such aesthetic purpose but was designed to help index and improve access to images on the internet. The users were unlikely to enlarge the thumbnails and use them for artistic purposes because the thumbnails were of a much lower resolution than the originals making them inappropriate as display material. The court also found that given the thumbnails' lack of artistic purpose, their use did not stifle creativity. Applying the various factors available under their statute, the appellate court determined that two of the factors stated there weighed in favour of the defendant which was sufficient for a finding of fair use.

[213] Unlike the situation in the United States of America, the Act does not allow for 'fair dealing' to be assessed by considering a broad category of circumstances and ascertaining whether those circumstances conform to a set of statutory guidelines. On the contrary, fair dealing under the Act is confined to 'fair dealing' for the prescribed purposes set out in that section and no more. The aforesaid case therefore has to be read in the context of application of the statutory test provided in that jurisdiction.

[214] In Singapore the existence of s 35(2) of the Singapore Copyright Act assists in establishing fair dealing. In the case of *Aztech Systems Pte Ltd v Creative Technology Ltd* [1996] 1 SLR 683 the court applied the section which provides that for the purposes of determining whether a dealing constitutes a fair dealing with the work the following facts are relevant:

> (a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
>
> (b) the nature of the work ...;
>
> (c) the amount and substantiality of the part copied taken in relation to the whole work...; and
>
> (d) the effect of the dealing upon the potential market for, or value of, the work ...

[215] When all the different tests in different jurisdictions are considered a vein of commonality is clearly discernible throughout, albeit in the statutorily encapsulated tests or in the case law on the subject. It can therefore be no different in this jurisdiction. What then is the test to be applied in determining whether the use of a copyrighted broadcast amounts to 'fair dealing' within the purview of the Act? It is imperative to incorporate the vein of commonality evident in all jurisdictions in formulating such a test. It is also important to bear in mind that fair dealing within s 13(2) cannot be dissected from the purposes for which it is permitted as discussed previously. Bearing in consideration these significant factors, the matters to be considered in determining whether a use or dealing is 'fair dealing' within the Act includes the following factors:

> (a) the purpose of the dealing and whether it falls within the specified exceptions in s 13(2)(a);
>
> (b) the nature of the work;
>
> (c) whether it can be said that a substantial part of the work has been copied or utilised when compared with the original work;
>
> (d) on an objective assessment what is the impression created by the reproduced/copied dealing;
>
> (e) the effect of such dealing upon the potential market for, or value of the work;
>
> (f) what is the motive of the party in its dealing with the work.

[216] On an application of the foregoing to the current facts, the following conclusions result:

> (a) The purpose of the dealing is for the purposes of the defendants' media

monitoring business. The issue of whether it falls within the specified exceptions in s 13(2)(a) is considered later under 'non-profit research'.

(b) The nature of the work comprises the plaintiffs' broadcasts of the television news programmes produced by them.

(c) If the exhs P2A–P2D are considered it is evident that a relatively short portion of the plaintiffs' entire news programme only is utilised. However the word 'substantial' does not only connote quantity. It also connotes the essence of the broadcast, the message and information communicated thereby. As stated in *Hubbard and another v Vosper and another* consideration ought to be given to the number and extent of the reproduction. In the instant case it is not in dispute that the entirety of the plaintiffs' television news programmes broadcast, are recorded by the defendants and stored. The relevant part sought by a particular client is then edited, compiled and provided in virtually original form to the client. On these facts it appears to the court that a substantive portion, if not the entirety of the plaintiffs' works are utilised.

(d) The impression that arises from a consideration of the annexure of these specially edited and compiled segments of the plaintiffs' broadcasts, is that the defendants have reproduced in substantial part the plaintiffs' broadcasts of their television news programmes. The fact that there is an express acknowledgement of the plaintiffs' entitlement to copyright does not materially affect this impression.

(e) The effect of such dealing on the potential market for, or value of the work, ie the broadcasts is that the plaintiffs ability to market, distribute and sell copies of its own broadcasts at costs designed to take into account the cost of production of such broadcasts is disrupted and adversely affected. This is because, as borne out by the evidence, the public purchases copies of the plaintiffs' broadcasts from the defendants rather than the plaintiffs themselves. They therefore suffer loss. Significantly, the public is mistaken into thinking that the defendants and the plaintiffs are related or conduct a related business.

(f) The motive of the defendants in recording continuously the broadcasts of the plaintiffs' television news programmes is to compile an archive of information so as to provide data and analysis to its clients for a fee. The fact that the defendants sought to procure from the plaintiffs' a licence to carry out their recording discloses that the defendants knew and understood that they were infringing the plaintiffs' copyright. The defendants enjoy licences with other broadcasters, thereby corroborating the fact that the defendants fully comprehend the extent of their actions. In other words, the defendants, in order to conduct their media monitoring business were prepared to continue to infringe

A the plaintiffs' copyright in the broadcast of their television news programmes.

'Non-profit research'

B **[217]** What is meant by 'non-profit research'? Professor Khaw Lake Tee in her book, *Copyright Law in Malaysia* states as follows:

> ... The term 'non-profit' is problematic. In the first edition, it was suggested that 'non-profit research' referred to research conducted for non-commercial purposes and therefore research conducted by corporations, companies and other business associations was excluded from this defense. Implicit in those statements was the suggestion that non-profit research was confined to research conducted by bodies other (than) these commercial entities, such as university researchers and academics. However, it is now acknowledged that the above interpretations may not be entirely correct as there may be cases where university researchers are conducting research not purely for the sake of academic research and publication but with a view to potential commercialization or for projects commissioned by commercial enterprises. Similarly, there could be situations where research by corporations, companies and other business associations may not necessarily be conducted with a view to profit, though such cases may be rare indeed. The qualification 'non-profit' must thus be read in relation to the research itself and not to the persons or entities conducting it, an interpretation which is not inconsistent with the wording of s 13(2)(a) itself.

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F **[218]** In this context, the defendants submit that they have made it clear to their clients and the public that their charges are only in respect of the defendants' compilation, editing and delivery services. They maintain that they do not actually charge for the excerpt. Applying the foregoing the defendants contend that it cannot be said certainty that they are not involved in 'non-profit' research which has to be judged at the time the research was made and not at the time the clips are delivered to the customers. Further they maintain that the first defendant, by recording and reviewing is doing what every company concerned with its image is doing in-house vide their own employees or through other larger public relations companies or media monitors, such as themselves. Research when done for these companies own use it is contended, is non-profit. In the instant case, instead of an individual company carrying out the media monitoring itself, it hires an agent to do so and this in itself warrants, according to the defendants, the application of the statutory exception of fair dealing for non-profit research to themselves.

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I **[219]** The plaintiffs contend otherwise. They point to the fact that the entire enterprise set up by the defendants is for profit and maintain that the defendants cannot surgically incise the clippings or segments of the news programmes compiled and maintain that those portions are to be viewed in

isolation as amounting to fair dealing for non-profit research, to the exclusion of the rest of the defendants' operations. A

[220] Having considered the two competing contentions, it appears to this court that in order to construe 'non-profit research' in the current factual matrix, it is necessary to take into account the totality of the defendants' operations and not focus on discrete sections separately. In other words, it appears to this court to be rather artificial to segregate that part of the defendants' operations which records and reproduces in its entirety the television news broadcasts made by the plaintiffs, enabling segments to be compiled and edited subsequently for purposes of appending such clips to the reports and analysis conducted by the defendants. The court would have to accept that that portion of the operations alone is free but that the compiling, editing and compressing processes were being charged for. However upon a consideration of the totality of the evidence of the defendants' and plaintiffs' witnesses, it appears that the segments which are produced directly from the plaintiffs' original broadcasts comprise an integral and inextricable part of the defendants' operations. B C D

[221] The fact that several parties approached the plaintiffs to ascertain whether the defendants who had approached them with a view to offering for sale segments from news programmes produced by the plaintiffs for a fee, ousts the possibility of any such segments being provided without a fee. E

[222] The trap purchases evidence the fact that the defendants in fact store the recordings of the plaintiffs' television news programmes for a considerable length of time, as segments of broadcasts produced more than a year ago were still available for potential sale to the plaintiffs. F

[223] If, as I have concluded, the sale of news 'clips' and segments of broadcasts produced by the plaintiffs comprises an integral part of the defendants' media monitoring services, which comprises the core business conducted by the defendants for a sizeable profit, how can it be said that on the facts of the instant case, the annexing of clippings of news segment broadcasts produced by the plaintiffs, but reproduced and sold by the defendants amounts to non-profit research? G H

[224] The defendants have given evidence to show that they carry out research and analysis for their clients, the public, for profit. They have explained in detail how their business is carried out. It is evident from the evidence of DW1, DW2 and DW4 who portray the typical client profile of the defendants' clients that they place considerable significance on the news clippings or segments of television news programmes sent to them by the defendants. It comprises, according to their evidence, an integral part of the I

defendants' media monitoring services. They testified that the removal of the defendants' clips of the plaintiffs' broadcasts would adversely affect their research and analysis reports, as they maintained that it was important for them to be able to visualise the impact of the contents of those clips relating to their individual companies or their research.

[225] As such it follows that the clips of the plaintiffs' broadcasts which the defendants copy entirely or substantially and which they subsequently compile, edit, store and distribute does not comprise 'non-profit research'. A profit is derived by the defendants from its operations as a media monitoring business, of which the annexure of copies of segments of, inter alia, the plaintiffs' broadcasts comprises an integral part. Therefore the research carried out by the defendants appears to be for profit and does not appear to fall within the purview of this purpose.

[226] In *Television New Zealand v Newsmonitor Services Ltd* (1993) 27 IPR 441 ('the *TVNZ* case'), a decision of the High Court of New Zealand, a similar situation arose. A news monitoring entity known as Newsmonitor Services Ltd carried on a business whereby it taped broadcasts of television and radio news and current affairs programs. It then advised its customers when items of interest they had specified were transmitted. If a customer indicated that they required a transcript, then the news monitoring agency would transcribe the relevant parts of the programme as specified, whereupon a copy would be supplied for a fee. The plaintiff in that case, Television New Zealand or TVNZ, broadcast television programmes throughout New Zealand. It claimed that Newsmonitor committed breaches of copyright when it records by way of video TVNZ's news and current affairs programs and when it supplies transcripts of portions of them to its customers.

[227] The foregoing facts are similar to the present factual matrix, save that in the instant case, the defendants provide actual compressed copies of the required or specified excerpts in virtually the identical form. In the *TVNZ* case, transcripts made from video recordings of the programs are instead sold to the clients together with the news monitoring analysis.

[228] As is the case here, Newsmonitor emphasised in the course of its evidence that the monitoring of broadcast news and current affairs is difficult in view of the ephemeral nature of broadcast material. They too explained that unless a video or audio taping was made of the exact words used so as to comprehend the nuances of the language, the content would not be captured accurately. In like manner they led evidence that it was inexpedient, not to mention extremely expensive for any one entity to monitor the airwaves 24 hours a day continuously. As such the rationale for a commercial enterprise such as itself, to carry out this function was evident. In like manner the

defendants here too, explained the rationale and the need for a commercial enterprise that conducted media monitoring services.

[229] It was also stressed that a news monitoring service is symbiotic to, and not in competition with broadcasters. In the instant case too, the defendants have emphasised this fact and utilise this as a further basis for maintaining that no breach of copyright is committed by them. They maintain that the fact that they are not rivals of the plaintiffs contributes significantly to the defence of 'fair dealing'.

[230] By way of defence in relation to committing a breach of broadcast copyright, Newsmonitor maintained that their recordings of the broadcasts were made 'for private purposes'. The legislation then in New Zealand provided that the acts restricted by copyright in a broadcast include, in so far as it comprises visual images, the making 'otherwise than for private purposes'. The court in the *TVNZ* case therefore had to consider the term 'private purpose' as opposed to 'non-profit research' in the instant case. Notwithstanding that the terms used are distinct and different, the rationale adopted by Blanchard J in the *TVNZ* case is instructive. After discussing the meaning to be attributed to the words 'private purpose' the learned judge went on to state:

> ... When Newsmonitor makes video tapes it is not doing so for its own private and internal purposes. It has no private interest in the tapes. They serve only as a means of carrying out its news monitoring activities in fulfillment of its contracts with its customers. Newsmonitor's purpose in making the tapes is entirely commercial. Section 15(4) makes what I deduce to be intended to be a very limited inroad on the broadcast copyright created by the section. I do not think that it can have been intended that the reference to 'private purposes' was to allow a taping of the broadcasts in order to exploit all or part of their content commercially. It is immaterial that end users, namely customers may themselves not have intended to sue the transcripts for anything other than internal reference. In other words, I equate 'private' not only with non-public, but also with an absence of commercial exploitation involving, directly or indirectly, a disposition of the work ....

[231] In the Act s 13(2)(a) allows for an exemption of copyright broadcast control in respect of 'fair dealing for the purposes of non-profit research'. How then is 'non-profit research' to be construed? It appears to this court that those words must be given their normal and ordinary dictionary meaning as has been done in other jurisdictions (see *De Garis & Anor v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625). The words denote quite simply that the research undertaken should not be for profit. This in turn means that in order to fall within the exception, the 'research' undertaken by the defendant (if it can be called that), must be for a non-profit purpose. In other words, the section appears to allow an exception for a non-profit enterprise.

[232] In ascertaining whether the acts of the defendants in recording, storing, compiling, archiving, editing and distributing for sale to their clients or the public, copies of the plaintiffs' broadcasts falls within the purview of this exception, it seems to my mind that the entirety of the defendants' operations are to be considered as a whole. This has been discussed above. When considered as a whole, the inexorable conclusion that presents itself on the facts are that the defendants are engaged in a commercial or profit based enterprise, which therefore cannot fall within the definition of 'non-profit research'.

[233] In the *TVNZ* case, reference was made to a decision of the United States Court of Appeals for the Eleventh Circuit, notwithstanding that the statutory framework was somewhat different. Again it was the reasoning and the thrust of the decision that was instructive. In the *Pacific and Southern Company Inc Wxia-Tv v Duncan Tv* 744 F 2d 1490 the defendant had taped and sold the plaintiff's television broadcasts. In concluding that it did not amount to 'fair use' the court gave as its reason the fact that the defendant was doing so 'for unabashedly commercial reasons despite the fact that its' customers buy the tapes for personal use'. The court added that a commercial purpose makes copying on to a videotape cassette 'presumptively unfair'.

[234] Again notwithstanding the differing statutory frameworks the thread of commonality to be found in all the jurisdictions is that any inroads into the rights of control bestowed on copyright owners does not extend to include commercial enterprise or a profit making business where the person/entity reproducing the owner's copyrighted material does so for his/its commercial profit.

[235] Blanchard J in the *TVNZ* case put it this way:

> ... I too think that fair dealing for the purposes of research or private study does not encompass an activity in which the material concerned is simply appropriated and passed on to others for commercial profit of the appropriator. It seems to me that the section draws a line between the paid conduct of research by an employee of a commercial organisation in the course of employment, and a paid appropriation of material which is then sold to someone else for the purposes of research or private study ...

[236] By way of contrast to the decision in the *TVNZ* case, the defendants point to a decision of the Supreme Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] SCC 13 where the issue of 'fair dealing' was considered in detail and a comprehensive test formulated to assess the same. The facts are as follows.

[237] The Law Society of Canada, the appellant, maintains and operates a reference and research library with one of the largest collections of legal materials in Canada. It is known as the Great Library. It provides request based photocopy service for law service members, the judiciary and other authorised researchers. Under this 'custom photocopy service' legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission to requestors. The law society also maintains self service photocopiers in the Great Library for use by its patrons. The publishers who are the respondents, commenced copyright infringement actions against the law society, seeking a declaration of subsistence and ownership of copyright in specific works and a declaration that the law society had infringed copyright when the Great Library reproduced a copy of each of the works. The publishers also sought a permanent injunction prohibiting the law society from reproducing these works as well as any other works that they published. The law society denied the claim and counterclaimed for a declaration that copyright is not infringed when a single copy of a reported decision, case summary or a limited selection of text is made for the purposes of research, by either the Great Library staff, or one of the patrons on a self-service copier. The trial court allowed the publishers' action in part, finding that the law society had infringed copyright in certain works. The counterclaim was dismissed. The Supreme Court of Canada held that the law society's appeal should be allowed. The publisher's cross-appeal was dismissed. The court found that the law society does not infringe copyright when a single copy of a reported decision, case summary or limited text selection is made by the Great Library in accordance with its access policy. Neither did it sanction copyright infringement by maintaining a photocopier in the library. Such use it was maintained, amounted to fair dealing under the provisions of their copyright act which stated that fair dealing for the purpose of research or private study does not infringe copyright.

[238] In construing the term 'research' the Canadian Supreme Court reasoned that the word had to be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained, and is not limited to non-commercial or private contexts. Lawyers carrying on the business of law for profit are conducting research within the meaning of s 29. The court determined that in ascertaining whether or not a dealing amounts to fair dealing within their statute, the following facts would be relevant, namely the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work.

[239] The court went on to find that the law society's dealings with the publishers' works through its custom photocopy service were research based and fair. The access policy placed appropriate limits on the type of copying that

the law society did. A copy was only made for the specific purposes of research, criticism, review or private study. If not for one of these purposes, the copy would not be made.

[240] The defendants contend that as in the case above, they are not infringing the plaintiffs' broadcast copyright because they, like the law society, provide a copy to their clients to enable their clients to conduct internal research. The defendants point to the fact that in the *CCH* case, the Supreme Court of Canada held that the word 'research' ought to be construed widely and liberally so as not to limit it to non-commercial entities or private contexts.

[241] Under the Act however, as discussed in some detail earlier on in this judgment, fair dealing in Malaysia is qualified by the purpose for which such dealing is conducted. And in relation to research, that term is further qualified by the words 'non-profit'. There is no such qualification in the Canadian statute which provides simply that: 'Fair dealing for the purpose of research or private study does not infringe copyright.' In other words the Canadian statute refers to 'research' while the Act provides for 'non-profit research'. As such in construing research, the same broad and liberal approach cannot be adopted. In this jurisdiction research which is exempt from copyright infringement has to be non-profit research. As discussed earlier those words connote a non-commercial or profit based research. Further and looking at the matter more substantively, it is evident that the law society in providing single copies of cases for users of the Great Library were facilitating research. The fact that the law society was providing copies which were used by lawyers in the practice of their profession which was for profit did not preclude the Supreme Court of Canada from adjudicating that such use fell within the purview of 'fair dealing'. In other words the person or entity who facilitates another person's fair dealing may be entitled to the same protection under the Canadian statute as that person. However the fact that fair dealing for purposes of research can extend to someone who is assisting another person in the conduct of research in Canada again stems from the fact that research may be given a wide and liberal interpretation in the light of the absence of the words 'non-profit' in that jurisdiction. Here the restriction is express and cannot be ignored. However it should be noted that under the Act, s 13(2)(l) makes express exclusion for use of a work for the purposes of any judicial proceedings, royal commission, legislative body, statutory or governmental inquiry or for the purposes of the giving of professional advice by a legal practitioner. Therefore the same degree of protection is afforded under the Act. However the scope of the Malaysian Copyright Act is such that the exempt circumstances are strictly prescribed. The interpretation to be accorded to those exceptions is therefore as strictly set out under the Act. Even if a wide or liberal interpretation is accorded it must fall squarely within the purview of those exceptions. In the instant case, the defendants' operations fail to fall within any of the provisions of the exceptions

prescribed.

CONCLUSION

[242] ln summary, as I have concluded earlier, the plaintiffs have established in the course of this trial that they enjoy broadcast copyright in the plaintiffs' television programmes broadcast from the Republic of Singapore. They also enjoy film copyright in the pre-recorded film segments of the plaintiffs' television news programmes.

[243] There subsists in the television news programmes broadcast from Singapore broadcast copyright and film copyright in the pre-recorded segments of the television programmes.

[244] The defendants' acts of recording the plaintiffs' television news programmes off air has infringed the plaintiffs' copyright in broadcast and film vis-a-vis the pre-recorded segments.

[245] The defendants' acts of recording, compiling, archiving, compressing, editing, reproducing and distributing, albeit for sale or not amount to a reproduction and/or substantial reproduction of the plaintiffs' television news programmes.

[246] The plaintiffs have proved such infringement by the production of infringing copies, exh P2A–P2D which were available for comparison with true copies of the complete news programmes contained in four discs in exh P10.

[247] The plaintiffs failed to produce to the court infringing copies of the plaintiffs' radio programmes, although they contend that such copies are contained in exhs P2A–P2D. Neither did the plaintiffs produce true copies of such radio programmes through PW6 or in exh P10. As such the court had no materials on which it could ascertain the subsistence of copyright any or all rights flowing there from. In this context the plaintiffs contend that the defendants agree that they record all the plaintiffs' radio programmes off air. This does not however relate directly to the proof of subsistence of copyright which is a pre-requisite to establishing infringement and entitlement to relief. Such subsistence cannot be assumed or presumed by the court. The parties must either agree on the mode of proof of establishing such subsistence or provide sufficient evidence to establish such subsistence. In the instant case, neither limb was fulfilled. Therefore the court could not conclude that the plaintiffs had established the subsistence of broadcast and sound copyright in the radio programmes. To that extent the relief afforded to the plaintiffs is in respect of their television news programmes. However as discussed in the body

of the judgment the relief granted extends to all television news programmes broadcast by the plaintiffs from Singapore.

[248] Having established the subsistence and infringement of broadcast copyright and film copyright in the pre-recorded segments of the plaintiffs' television news programmes the court considered the defence of fair dealing for the purposes of non-profit research and concluded that the defendants' operations as a media monitoring agency did not fall within the purview of that statutory exception. Neither did it fall within any of the other exceptions set out in s 13(2) of the Act.

[249] The plaintiffs are accordingly entitled to:

(a) an injunction to restrain the defendants and each of them, whether by themselves, their employees or agents or any of them and/or through or in collaboration with any individual or corporation or otherwise howsoever, from reproducing and/or substantially reproducing and/or copying the television news programmes aired by and belonging to the plaintiffs in the form of VHS, Betacam, CD format, VCD, DVD and/or other digital format and/or by any other name into material form, for the purposes of selling, offering for sale and/or distributing the same in the course of business;

(b) an injunction to restrain the defendants and each of them whether by themselves their employees or agents or any of them and/or through or in collaboration with any individual and/or corporation or otherwise however, from copying, recording, reproducing, offering for sale, distributing, marketing, advertising, selling and/or otherwise dealing in or with the television news programmes and /or the copyrights and the infringing goods in VHS, Betacam, CD format, VCD, DVD and/or other digital format;

(c) an order for the removal from the defendants' library listing, both online and within the offices of the defendants, the television news programmes;

(d) an order to deliver up all copies both in the soft and/or digital and/or video and/or Betacam and/or CD format, VCD and/or DVD format and/or any other format of all the copyrighted material which are infringing the television news programmes which are in the defendants' possession or in the possession of agents and servants of the defendants at the defendants' own expense, to the plaintiffs solicitors for destruction in any manner deemed fit by the plaintiffs; and

(e) an award of damages arising out of breach of the plaintiffs' copyright, if any, in the aforementioned material to be assessed by this honourable court.

[250] This court makes no order in relation to the causes of action relating to passing off and infringement of trademarks as these causes of action are not pursued by the plaintiff.

[251] The costs of this action are to be borne by the defendants.

Plaintiffs' claim allowed with costs.

Reported by Kanesh Sundrum